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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IGNACIO PEREZ, ON BEHALF)	
OF HIMSELF AND ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
PLAINTIFFS,)	NO. C-16-3396 YGR
)	
VS.)	MONDAY, APRIL 29, 2019
)	
RASH CURTIS & ASSOCIATES,)	OAKLAND, CALIFORNIA
)	
)	PRETRIAL CONFERENCE
DEFENDANT.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:	BURSOR FISHER, P.A. 1990 N. CALIFORNIA BLVD., STE. 940 WALNUT CREEK, CALIFORNIA 94596
BY:	TIMOTHY FISHER, ESQUIRE YEREMEY O. KRIVOSHEY, ESQUIRE BLAIR REED, ESQUIRE
	BURSOR & FISHER 888 SEVENTH AVENUE NEW YORK, NEW YORK 10019
BY:	SCOTT A. BURSOR, ESQUIRE
FOR DEFENDANT:	ELLIS LAW GROUP LLP 1425 RIVER PARK DRIVE, STE. 400 SACRAMENTO, CALIFORNIA 95815
BY:	MARK E. ELLIS, ESQUIRE ANTHONY P.J. VALENTI, ESQUIRE LARRY IGLESIAS, ESQUIRE
REPORTED BY:	DIANE E. SKILLMAN, CSR 4909, RPR, FCRR OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 MONDAY, APRIL 29, 2019

10:00 A.M.

2 P R O C E E D I N G S

3 **THE CLERK:** CALLING CIVIL ACTION 16-3396 IGNACIO
4 PEREZ VERSUS RASH CURTIS & ASSOCIATES.

5 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

6 **MR. ELLIS:** GOOD MORNING, YOUR HONOR. MARK ELLIS --

7 **THE COURT:** MR. ELLIS, HOLD ON. I ALWAYS START WITH
8 PLAINTIFFS.

9 **MR. ELLIS:** OKAY.

10 **THE COURT:** I DON'T CARE WHO YOU ARE, WHAT COLOR YOU
11 ARE, WHAT GENDER YOU ARE, I ALWAYS START WITH PLAINTIFFS.

12 **MR. BURSOR:** HI. GOOD MORNING, YOUR HONOR. SCOTT
13 BURSOR FROM BURSOR & FISHER FOR THE PLAINTIFFS AND THE CLASS.

14 WITH ME AT COUNSEL TABLE ARE MY PARTNERS TIM FISHER, ON
15 THIS SIDE OF THE CONFERENCE TABLE, YEREMEY KRIVOSHEY, ON THE
16 OTHER SIDE OF THE CONFERENCE TABLE, AND OUR ASSOCIATE BLAIR
17 REED.

18 **THE COURT:** OKAY. GOOD MORNING. ALL RIGHT.

19 **MR. ELLIS:** GOOD MORNING, YOUR HONOR. MARK ELLIS,
20 ELLIS LAW GROUP, LLP. AND WITH ME TODAY IS ANTHONY VALENTI,
21 ONE OF MY ASSOCIATES, AND LARRY IGLESIAS.

22 **THE COURT:** OKAY. GOOD MORNING.

23 LOTS TO DO. SO, IN TERMS OF YOUR STATEMENT, YOU WANTED
24 CLARIFICATION ON SOME OF THE EXHIBITS WHICH I WILL GIVE TO
25 YOU.

1 AND ON THE TOPIC OF THE NATURE OF THE EVIDENCE, I CAN
2 ASSUME WHAT I BELIEVE TO BE YOUR PERSPECTIVES ON WHETHER OR
3 NOT A JURY PROVIDES A COURT WITH A FACTUAL DETERMINATION FROM
4 THEIR PERSPECTIVE ON WILLFULNESS, BUT I'VE NOT HAD BRIEFING ON
5 THE TOPIC. SO BECAUSE I HAVEN'T HAD BRIEFING AND I HAVEN'T
6 ASKED YOU SPECIFICALLY, I LEFT MYSELF WHAT I CALL WIGGLE ROOM
7 BY SAYING THAT I WOULD INSTRUCT THE JURY AS APPROPRIATE
8 BECAUSE YOU HAVEN'T, AS I WORKED THROUGH THE ISSUES, I
9 REALIZED YOU HAD NOT BRIEFED THAT ISSUE. MY -- AND I'VE
10 OUTLINED IN MY ORDER WHAT I THINK THE LEGAL PARAMETERS ARE.

11 THAT EVIDENCE IS ONLY RELEVANT ON THAT TOPIC OF
12 WILLFULNESS. AND SO IF THE JURY IS NOT MAKING A DETERMINATION
13 ON WILLFULNESS, IT IS NOT RELEVANT. IF A JURY IS, THEN IT IS.

14 **MR. ELLIS:** SO --

15 **THE COURT:** WOULD YOU LIKE TO SAY SOMETHING,
16 MR. ELLIS?

17 **MR. ELLIS:** YES, YOUR HONOR.

18 I THINK I CAN HELP EVERYONE WITH THIS. IN LOOKING THROUGH
19 THE DOCUMENTS IN PREPARATION FOR TODAY'S HEARING, I THINK... I
20 THINK PLAINTIFFS ARE RIGHT. I THINK UNDER THE -- IF YOU LOOK
21 AT THE PLAIN LANGUAGE OF THE STATUTE, IT SAYS "THE COURT".
22 AND THEY CITED IN THE SUBMISSION THAT WE JUST DID THE DISTRICT
23 COURT OF OREGON DECISION.

24 AND SO ALTHOUGH I HATE TO AGREE WITH PLAINTIFFS ON
25 ANYTHING, IN THIS CASE I THINK THAT... I THINK THAT I WOULD

1 CONCEDE THAT THIS SHOULD BE DECIDED BY YOU, YOUR HONOR. AND
2 BECAUSE OF THAT, I DON'T THINK THAT ANY OF THE EVIDENCE ON
3 WILLFULNESS IS RELEVANT TO THE JURY'S DETERMINATION.

4 **MR. BURSOR:** I AGREE, YOUR HONOR. I JUST WANT TO
5 MAKE CLEAR, WE THINK THAT -- WE HAVE NOT BRIEFED WHETHER YOUR
6 HONOR NEEDS AN ADVISORY RULING FROM THE JURY. OUR POSITION IS
7 YOU DO NOT. YOU ARE QUALIFIED TO MAKE A DETERMINATION OF
8 WILLFULNESS WITHOUT ANY INPUT FROM THE JURY.

9 AND WE UNDERSTOOD THIS ISSUE TO RELATE PRIMARILY TO
10 EXHIBITS 504 AND 505 WHICH WE HAD A MOTION IN LIMINE ON AND
11 THE MOTION IN LIMINE WAS GRANTED IN PART, DENIED IN PART, BUT
12 EVEN THE PARTS THAT WERE DENIED, I DON'T THINK THE OBJECTIONS
13 WERE OVERRULED. WE WOULD STILL HAVE THE ABILITY TO MAKE THOSE
14 OBJECTIONS AT TRIAL, AND THEN YOUR HONOR WOULD RULE AT THEM AT
15 TRIAL. FOR EXAMPLE, WHETHER THE DEFENDANTS HAD LAID THE
16 FOUNDATION FOR BUSINESS RECORDS EXCEPTION, AND SO FORTH.

17 BUT IF THOSE... IF THOSE DOCUMENTS RELATE ONLY TO
18 WILLFULNESS AND YOUR HONOR IS GOING TO BE DECIDING WILLFULNESS
19 AND THAT IS NOT GOING TO BE PRESENTED TO THE JURY, WHICH I
20 THINK IS THE CORRECT RESULT, THEN I DON'T THINK WE NEED TO
21 SPEND A LOT OF TIME ON THOSE OBJECTIONS BECAUSE ONLY YOUR
22 HONOR IS GOING TO SEE THEM. AND, YOU KNOW, IT WILL BE A
23 SITUATION WHERE YOUR HONOR COULD BE LOOKING AT THEM, AND IF WE
24 ARE OBJECTING, WE ARE OBJECTING. IT'S NOT WHERE YOU HAVE TO
25 SEND A JURY OUT OF THE ROOM OR ALL THAT TYPE OF THING.

1 SO I THINK IF THAT'S RIGHT, WE DON'T NEED TO WORRY ABOUT
2 IT RIGHT NOW AND WE CAN WORRY ABOUT IT DURING PHASE II, IF AND
3 WHEN THERE IS A PHASE II.

4 **MR. ELLIS:** I DISAGREE. 504 AND 505 ARE COMING IN
5 FOR DIFFERENT REASONS THAN AS TO WILLFULNESS AND TO INTENT.
6 IN FACT, THEY COME IN FOR THE REASON OF DEALING WITH THE
7 SKIP-TRACING ISSUE, WHICH TO ME AT THIS POINT IN TIME, GIVEN
8 THE COURT'S RULINGS ON MR. PEREZ AND HIS INDIVIDUAL CLAIM, IS
9 REALLY GOING TO BE THE BIGGEST FACTUAL ISSUE OF THE TRIAL.
10 THAT IS, IS THERE A CONNECTION BETWEEN MR. PEREZ AND THE
11 CLASS? AND IS HE A PROPER REPRESENTATIVE OF A SKIP-TRACED
12 CLASS.

13 THAT'S WHERE I THINK THE BATTLE LINES WILL BE DRAWN NEXT
14 WEEK. AND SO IN ANY EVENT, I UNDERSTAND YOUR RULINGS FROM
15 YOUR TRIAL ORDER NO. 3, AND I DON'T HAVE ANYTHING TO ARGUE AT
16 THAT POINT IN TIME -- AT THIS POINT IN TIME.

17 **THE COURT:** LET'S TALK ABOUT, AS A WAY OF GETTING TO
18 NEXT WEEK, LET'S TALK ABOUT THE VERDICT FORM THAT -- I SENT
19 YOU A COURTESY COPY ON FRIDAY. AND THE REASON THAT I WANT TO
20 DO THAT IS BECAUSE WHAT THE JURY IS DECIDING IS ACTUALLY
21 IMPORTANT.

22 AT ONE POINT I WONDERED, GIVEN THE RULINGS THAT I MADE,
23 YOU KNOW, WHETHER THE DEFENDANTS, AS MUCH AS THEY -- WELL, I
24 DIDN'T KNOW -- LET'S GO THROUGH THIS FIRST BEFORE I TALK ABOUT
25 THAT.

1 I'M -- SO I'D LIKE TO KNOW, BECAUSE I'VE SEEN THE EVIDENCE
2 THAT HAS BEEN DISPUTED. I HAVEN'T SEEN ALL OF THE EVIDENCE.
3 IN ONE OF THE VERSIONS OF THE VERDICT FORM THAT WAS GIVEN TO
4 ME, THERE WAS THIS WHOLE ISSUE ON THE CLASS. AND I DIDN'T
5 UNDERSTAND THAT BECAUSE THE JURY DOESN'T HAVE A ROLE IN
6 DECIDING CLASS ISSUES. THAT'S A JUDICIAL ISSUE.

7 BUT IN THE JURY INSTRUCTIONS, WHICH I ALSO SENT AT THE
8 SAME TIME, THERE WAS AN ENTIRE INSTRUCTION. AND IT WAS --
9 IT'S ON PAGE 22 OF WHAT I SENT YOU -- WHERE THE FOUR CLASSES
10 WERE DEFINED, SKIP-TRACE CLASS 1, SKIP-TRACE CLASS 2,
11 NON-DEBTOR CLASS 1 AND NON-DEBTOR CLASS 2. BUT I TEND TO ONLY
12 INSTRUCT JURIES ON TOPICS WHICH ARE RELEVANT TO THEIR
13 DECISIONS.

14 AND SO I DIDN'T UNDERSTAND WHAT THE THOUGHT PROCESS WAS
15 WITH ME READING AN INCREDIBLY LONG, TEDIOUS INSTRUCTION ABOUT
16 FOUR DIFFERENT SUBCLASSES AND HOW THAT TRANSLATED TO WHAT WE
17 WERE ACTUALLY ASKING THEM TO DO IN THE VERDICT FORM.

18 SO SOMEONE EXPLAIN TO ME, ONE, WHY WE ARE INSTRUCTING THEM
19 ON THESE VARIOUS CLASSES WHEN THEY ARE NOT BROKEN DOWN IN ANY
20 WAY, SHAPE, OR FORM IN THE VERDICT FORM, AND WHAT IS IT THAT
21 WE ARE TRYING TO GET THEM TO DECIDE, IF ANYTHING, ON THESE --
22 ON THAT TOPIC? AND HOW -- SO THAT'S PART ONE.

23 AND THEN I WOULD LIKE TO KNOW WHAT THE EVIDENCE IS, TOO,
24 SO THAT I CAN THINK ABOUT IT BEFORE I HAVE TO DEAL WITH IT
25 NEXT WEEK.

1 WHO WANTS TO START?

2 MR. ELLIS: YOU WANT ME TO GO?

3 MR. BURSOR: IF YOU WANT TO GO, I HAVE ANSWERS, BUT
4 IF YOU WANT TO GO FIRST, THAT'S FINE.

5 MR. ELLIS: OKAY, YOUR HONOR.

6 SO, YOU KNOW, THE ISSUE I SEE AS WE'RE COMING TO TRIAL IS
7 WHICH PHONE NUMBERS HAVE BEEN SKIP-TRACED. AND WE START THAT
8 WITH MR. PEREZ AS AN INDIVIDUAL. AND THAT HAS EFFECTIVELY
9 BECOME ONE OF THE ELEMENTS IN THIS CASE.

10 SO THE JURY INSTRUCTIONS, YOU KNOW, HAVE THE NORMAL TCPA
11 JURY INSTRUCTION IN THE DOCUMENTS THAT YOU SENT TO US... IN
12 THE JURY INSTRUCTIONS THAT YOU SENT US, AND THEN IT HAS THE
13 CLASS. AND I DO THINK THEY ARE SOMEWHAT INCONSISTENT IN THAT
14 REGARD BECAUSE THE WAY THAT THIS CASE HAS COME TO THIS POINT
15 IS THAT THE NUMBER -- THERE IS -- THERE'S GOING TO BE THE
16 ISSUE OF MR. PEREZ'S INDIVIDUAL LIABILITY.

17 AND THE COURT HAS ALREADY DETERMINED TWO THINGS, AT LEAST
18 WITH RESPECT TO THAT. THAT IS THAT THE DIALER THAT HE WAS
19 CALLED WITH IS AN ATDS, RIGHT, AND, SECONDLY, THAT AS TO
20 MR. PEREZ, THERE WAS NO PRIOR EXPRESS CONSENT.

21 SO FOR ALL PRACTICAL PURPOSES, LET'S JUST BE HONEST HERE,
22 WE'RE DEALING WITH, AT LEAST AS TO HIM, THE ISSUE IS GOING TO
23 BE HOW MANY VIOLATIONS ARE THERE.

24 THE COURT: RIGHT.

25 MR. ELLIS: OKAY.

1 **THE COURT:** I AGREE WITH YOU SO FAR.

2 **MR. ELLIS:** SO NOW WE SWITCH TO THE CLASS.

3 SO, YES, THERE IS A CERTIFIED CLASS BUT YOU HAVE NOT
4 DETERMINED IN THAT CLASS CERTIFICATION OR IN ANY OF THE ORDERS
5 THAT WE HAVE THAT ARE EXTANT AT THIS POINT IN TIME AS TO
6 WHETHER -- HOW MANY OF THOSE -- WHETHER ANY, ALL, SOME, PART
7 OF THE CLASS MEMBERS WERE -- THEIR NUMBERS WERE OBTAINED BY
8 SKIP-TRACING.

9 **THE COURT:** CORRECT.

10 **MR. ELLIS:** AND THAT'S GOING TO BE -- THAT IS GOING
11 TO BE WHERE THE BATTLE LINE IS HERE. BECAUSE -- LET ME GO
12 FURTHER.

13 ASSUMING THAT, AND I THINK THE EVIDENCE IS GOING TO SHOW
14 YOUR HONOR, THAT THERE'S 26 PHONE CALLS TO MR. PEREZ. IF
15 WE'RE DEALING WITH THE FIRST CAUSE OF ACTION OF THE COMPLAINT,
16 THE NEGLIGENT VIOLATION OF THE TCPA, THAT'S GOING TO GIVE US
17 WHAT, \$13,000 IN DAMAGES.

18 IF THE COURT FINDS TREBLE DAMAGES IN THE SECOND OR
19 BIFURCATED PART OF THE TRIAL, THEN WE ARE GOING TO HAVE
20 \$26,000 IN DAMAGES.

21 BUT IF THE JURY COMES BACK, IN MY VIEW, AND FINDS THAT --
22 AND, AGAIN, I BELIEVE THIS IS GOING TO BE THE PLAINTIFFS'
23 BURDEN OF PROOF BECAUSE THIS IS HOW THEY SET UP THEIR CLASS
24 AND EACH ONE OF THE CLASSES HAS THIS AS A REQUIREMENT, IF THE
25 JURY COMES BACK AND FINDS THAT THEY HAVE NOT MET THEIR BURDEN

1 OF PROOF OF SHOWING THAT SOME, ANY, OR ALL OF THE CLASS
2 MEMBERS WERE SKIP-TRACED, BECAUSE -- AND ALONG WITH IT THEY
3 FIND THAT MR. PEREZ'S NUMBER WAS NOT SKIP-TRACED --
4 SKIP-TRACING HAS NOTHING TO DO WITH THE PRIMA FACIE CASE OR
5 THE DEFENSES, BUT IT'S AN IMPORTANT ELEMENT THERE, WHICH IS
6 WHY -- AND LET'S BE CLEAR ABOUT THIS. PLAINTIFFS ARE FIGHTING
7 SO HARD ON THOSE DOCUMENTS AND WE ARE FIGHTING SO HARD GOING
8 BACK, WE NOW HAVE A CASE. BUT IF -- A VICTORY FOR ME IN THIS
9 CASE IS HAVE THE JURY FIND THERE WAS NO SKIP-TRACING HERE, AND
10 WE'VE NOW HAD A CASE THAT'S BEEN GOING ON FOR FIVE YEARS AND
11 THE DAMAGES ARE \$26,000 AND, BY THE WAY, THE TCPA DOESN'T GIVE
12 ATTORNEYS' FEES.

13 IF THEY HAVE THEIR WAY AND THE JURY COMES BACK, THEN WE'VE
14 GOT A CASE THAT MAY BE WORTH \$250 MILLION, BUT AS I'VE SAID
15 BEFORE, THAT IS MONOPOLY MONEY WITH MY MOM AND POP OUTFIT.

16 SO IF I HAVE NOT ARTICULATED THIS BEFORE, I HAVE NOW
17 ARTICULATED. THAT IS WHAT THE TRIAL NEXT WEEK IS ALL ABOUT.

18 **THE COURT:** SO --

19 **MR. BURSOR:** I HAVE A VERY DIFFERENT VIEW OF THAT.

20 **THE COURT:** ALL RIGHT. LET ME HEAR YOUR VIEW.

21 **MR. BURSOR:** SO, JUST TO ADDRESS YOUR HONOR'S
22 QUESTION FIRST, THE JURY DOES NOT DECIDE CLASS CERTIFICATION.
23 YOUR HONOR DECIDES CLASS CERTIFICATION.

24 **THE COURT:** RIGHT, BUT YOU DO -- OKAY. I AGREE WITH
25 THAT. AND I'VE ALSO SAID, BECAUSE I'VE HAD TO DEAL WITH THIS,

1 AND I THINK WE'RE FINE GOING INTO TRIAL, WHICH IS THAT YOU
2 ACTUALLY HAVE TO HAVE A MEMBER OF THE CLASS.

3 **MR. BURSOR:** RIGHT. AND YOUR HONOR HAS DECIDED AT
4 THE CLASS CERT STAGE THAT WE'VE PRESENTED SUFFICIENT EVIDENCE
5 TO SHOW THAT MR. PEREZ IS A MEMBER OF THE CLASS. AND THERE IS
6 NO CONTRARY EVIDENCE THAT I'VE SEEN TO DATE, EVEN AMONG THE
7 STRICKEN MATERIALS, BUT BE THAT AS IT MAY, THAT'S NOT FOR THE
8 JURY TO DECIDE. YOUR HONOR DETERMINED THAT MR. PEREZ WAS AN
9 APPROPRIATE CLASS REPRESENTATIVE, AND SO NOW WE ARE HAVING
10 TRIAL.

11 AND SO YOUR HONOR'S QUESTION WAS, WHAT IS IT THAT THE JURY
12 DECIDES. AND THAT'S WHAT WE HAVE ON THE VERDICT -- AND WHY
13 WOULD THE JURY NEED TO BE INSTRUCTED ABOUT CLASS
14 CERTIFICATION?

15 SO, MY VIEW, AND I AM PRETTY SURE IT'S CORRECT, THAT THE
16 JURY NEEDS TO BE INSTRUCTED ABOUT CLASS CERTIFICATION BECAUSE
17 THEY NEED TO KNOW THE DECISION YOUR HONOR MADE BECAUSE THEY
18 ARE BEING ASKED --

19 **THE COURT:** NO, THEY DON'T NEED TO KNOW EXACTLY WHAT
20 I MADE. THEIR DECISION IS GOING TO BE INDEPENDENT OF MY
21 DECISION. MY DECISION WAS BASED UPON A RECORD THAT I HAD IN
22 FRONT OF ME AT THE TIME.

23 DO YOU AGREE, BECAUSE I THINK THAT MR. ELLIS IS PROBABLY
24 RIGHT, THAT IT IS AN ISSUE AS TO WHETHER OR NOT THERE IS
25 SUFFICIENT EVIDENCE -- I MEAN, WHETHER YOU MEET YOUR BURDEN ON

1 SKIP-TRACING. I CERTAINLY SAID YOU HAD ENOUGH TO PRESENT. I
2 NEVER SAID THAT YOU -- I MEAN, I DIDN'T GRANT SUMMARY JUDGMENT
3 ON THAT TOPIC.

4 **MR. BURSOR:** WELL, THERE WAS NO MOTION FOR SUMMARY
5 JUDGMENT ON THAT TOPIC.

6 **THE COURT:** RIGHT.

7 **MR. BURSOR:** BECAUSE IT IS A CLASS CERT ISSUE. BUT
8 YOUR HONOR DECIDED TO CERTIFY THE CLASS.

9 SO WHAT IS IT THAT THE JURY IS GOING TO BE ASKED TO DO?
10 ARE THEY GOING TO BE ASKED TO SECOND-GUESS YOUR CLASS
11 CERTIFICATION DECISION? NO.

12 **THE COURT:** YOU SAID YOU HAD ENOUGH EVIDENCE TO
13 PRESENT A JURY ON THE NATURE OF THIS CLASS -- ON WHETHER OR
14 NOT YOU COULD PROVE A CLAIM, A TCPA CLAIM FOR A CLASS, A
15 PARTICULAR KIND OF CLASS.

16 **MR. BURSOR:** YES. AND WE DO.

17 **THE COURT:** OKAY.

18 **MR. BURSOR:** BUT WHAT IS THE QUESTION THAT THE JURY
19 IS GOING TO BE ASKED TO ANSWER? THAT'S WHY WE ARE LOOKING AT
20 THE VERDICT FORM BECAUSE THAT'S WHERE THOSE QUESTIONS ARE.
21 OKAY?

22 SO YOUR HONOR HAS A NOTE IN THE JURY INSTRUCTION AT
23 PAGE 22 ABOUT THE CLASS DEFINITIONS: WHY DO I EVEN HAVE TO DO
24 THIS, RIGHT?

25 AND THE REASON YOUR HONOR HAS TO TELL THE JURY WHAT THE

1 CLASS IS IS BECAUSE QUESTIONS 4 AND FOLLOWING ON THE VERDICT
2 FORM, I THINK IT'S 4 THROUGH --

3 **MR. ELLIS:** 11.

4 **MR. BURSOR:** 4 THROUGH 11, ALL THOSE QUESTIONS
5 REQUIRE THE COURT -- PARDON ME, REQUIRE THE JURY TO DETERMINE
6 WHETHER PHONE CALLS WERE MADE TO CLASS MEMBERS AND HOW MANY.

7 SO IN ORDER TO DO THAT, THEY NEED TO KNOW THE CLASS
8 DEFINITION. AND THEY ALSO NEED TO KNOW THAT THE CLASS
9 DEFINITION IS SET IN STONE. THEY DO NOT GET TO CHANGE THE --
10 THEY DON'T DECIDE WHO'S IN THE CLASS --

11 **THE COURT:** NO, THEY DON'T, BUT THEY DO GET TO
12 DECIDE, IT SEEMS TO ME, AS TO WHETHER -- WHETHER CALLS WERE
13 MADE TO PERSONS WHOSE CELLULAR PHONE WAS OBTAINED BY
14 SKIP-TRACING.

15 **MR. BURSOR:** THAT'S THE SAME THING AS SAYING WHETHER
16 THEY WERE -- HOW MANY CALLS WERE MADE TO CLASS MEMBERS.

17 **THE COURT:** NO. IT'S A TWO-STEP PROCESS.

18 THE FIRST STEP IS, WERE THE CALLS MADE TO MEMBERS THROUGH
19 SKIP-TRACING OR WERE CALLS MADE TO PHONE NUMBERS OBTAINED
20 THROUGH SKIP-TRACING?

21 AND THE SECOND QUESTION IS, IF THE ANSWER TO THAT QUESTION
22 IS "YES", THEN HOW MANY?

23 **MR. BURSOR:** SO YOU'RE LOOKING AT QUESTION 4, FOR
24 EXAMPLE.

25 **THE COURT:** I WENT BACK TO THE CLASS DEFINITION, BUT

1 THIS IS -- I MEAN, LOOK, THE REASON THAT I SENT THESE THINGS
2 IN ADVANCE WAS TO TALK ABOUT THEM AND, TWO, I ONLY USED YOUR
3 VERSIONS OF IT IN A WAY THAT I CLEANED UP.

4 SO THIS VERDICT FORM AND THESE JURY INSTRUCTIONS WERE NOT
5 SET IN STONE. THEY ARE THERE SO WE CAN HAVE AN INTELLIGENT
6 DISCUSSION.

7 AS I SAID, ALL I'VE EVER SAID WAS THAT THERE IS SUFFICIENT
8 EVIDENCE TO PRESENT TO THE JURY. I HAVE NEVER SAID THAT YOU
9 HAVE PROVED YOUR BURDEN, AND YOU HAVE NEVER BROUGHT THAT
10 MOTION.

11 SO IT IS, I THINK, A THRESHOLD QUESTION TO KNOW WHETHER
12 THE JURY BUYS YOUR PRESENTATION OF THE EVIDENCE AND AGREES
13 WITH YOU THAT THE CALLS WERE MADE TO CELL PHONES OBTAINED
14 BY -- THROUGH SKIP-TRACING.

15 **MR. BURSOR:** SURE.

16 **THE COURT:** YOU HAVE TO PROVE THAT.

17 **MR. BURSOR:** I AGREE WITH THAT. BUT, YOUR HONOR --
18 WELL, I AGREE WITH THAT WITH RESPECT TO THE CLASS CLAIM, BUT
19 NOT WITH RESPECT TO MR. PEREZ'S CLAIM.

20 **THE COURT:** NO, OF COURSE NOT. THAT'S WHAT WE ARE
21 TALKING ABOUT. HE'S EASY. WE ARE TALKING ABOUT CLASS CLAIM.

22 SO THAT GOES TO EACH ONE OF THESE -- TO EACH ONE OF THESE
23 SUBCLASSES. BECAUSE IF YOU CANNOT PROVE THAT, THEN
24 EVERYTHING -- THEN THERE IS NO QUESTION OF WHETHER OR WHY, AND
25 I DON'T LIKE TO GIVE JURORS INSTRUCTIONS WITHOUT THERE BEING A

1 REASON TO GIVE THEM TO THEM.

2 **MR. BURSOR:** SO IF WE -- IF WE CANNOT PROVE THAT
3 THERE WAS A PHONE CALL MADE TO A CLASS MEMBER OBTAINED VIA
4 SKIP TRACING, THAT THAT EVER HAPPENED, I WOULD THINK IT -- IT
5 WOULD BE -- THAT WOULD BE A DECISION FOR YOUR HONOR TO MAKE,
6 AND THEN YOU WOULD DECERTIFY THE CLASS. I DON'T THINK YOU
7 WOULD ASK THE JURY DID THAT HAPPEN?

8 **THE COURT:** I DON'T KNOW -- WELL, WE CAN HAVE A
9 DEBATE ABOUT THAT.

10 SO, WHAT, YOU'RE EXPECTING THEM TO BRING A MOTION FOR
11 DECERTIFICATION AFTER TRIAL? YOU SAID YOU COULD PROVE DAMAGES
12 AND YOUR CAUSE OF ACTION BASED UPON -- WELL, THAT'S A VERY
13 ODD --

14 **MR. BURSOR:** IT'S NOT ODD AT ALL, YOUR HONOR, BECAUSE
15 THE CLASS CERT ISSUE IS FOR YOU AND YOU ALONE TO DECIDE.

16 IF YOU ARE TALKING ABOUT IS THERE A CLASS AND WHAT SHOULD
17 IT BE AND IS THERE A PROPER REPRESENTATIVE AND WHO THAT IS,
18 YOU ARE THE ONLY PERSON WHO CAN MAKE THOSE DECISIONS. THE
19 JURY CANNOT MAKE THOSE DECISIONS.

20 THE DECISIONS FOR THE JURY TO MAKE ON THE VERDICT FORM, AS
21 YOUR HONOR LAID IT OUT BASED ON WHAT WE SUBMITTED, I THINK IS
22 CORRECT, WHICH IS HOW MANY PHONE CALLS WERE MADE TO CLASS
23 MEMBERS.

24 NOW, IF MR. ELLIS IS RIGHT, AND WE CAN'T SHOW THAT THERE
25 WAS EVER A PHONE CALL MADE TO SOMEONE WHOSE NUMBER WAS

1 SKIP-TRACED --

2 **THE COURT:** IT'S NOT ONE. I MEAN, THE WHOLE POINT --
3 AND THIS IS, IN PART, THE ISSUE THAT I TRIED LAST FALL WAS
4 THAT IN ORDER TO PROVE A CASE, YOU DO NOT HAVE TO PROVE THAT
5 EACH AND EVERY PHONE CALL, RIGHT? IT'S A PREPONDERANCE
6 STANDARD. IT'S NOT BEYOND A REASONABLE DOUBT. IT IS NOT
7 CLEAR AND CONVINCING EVIDENCE, IT'S PREPONDERANCE.

8 AND SO THE QUESTION IS, WHAT DOES THE WEIGHT OF THE
9 EVIDENCE SHOW?

10 **MR. BURSOR:** I THINK I CAN EXPLAIN IT BY REFERENCE TO
11 THE VERDICT FORM, YOUR HONOR.

12 THE FIRST QUESTION ON THE VERDICT FORM THAT DEALS WITH
13 THIS IS QUESTION 5 WHERE YOUR HONOR WOULD ASK THE JURY THROUGH
14 THE VERDICT FORM: STATE THE NUMBER OF CALLS RASH CURTIS MADE
15 WITH ITS GLOBAL CONNECT DIALER TO CLASS MEMBERS' CELLULAR
16 TELEPHONE NUMBERS DURING THE CLASS PERIOD WITHOUT THEIR PRIOR
17 EXPRESS CONSENT.

18 AND I'M GOING TO PRESENT EVIDENCE AND THEN I'M GOING TO
19 ARGUE TO THE JURY THAT THERE WERE 501,043 SUCH CALLS THAT WE
20 PROVED THROUGH THE TESTIMONY OF MR. SNYDER AND MS. VERKOVSKAYA
21 AND MR. WEIR WHO WENT THROUGH THE CALL LOGS AND FOUND WHICH
22 PHONE CALLS WERE MADE TO SKIP-TRACED NUMBERS. SO I'M GOING TO
23 SAY THAT'S 501,043.

24 AND IF THE JURY WRITES THAT IN RESPONSE TO QUESTION 5, AND
25 I BELIEVE THAT'S WHAT'S GOING TO HAPPEN, THEY WILL HAVE

1 DETERMINED THAT ALL THOSE CALLS WERE MADE TO CLASS MEMBERS,
2 MEANING THAT THEY WERE SKIP-TRACED.

3 NOW, I EXPECT MR. ELLIS IS GOING TO STAND UP DURING
4 CLOSING ARGUMENTS AND SAY THAT THAT NUMBER SHOULD BE ZERO
5 BECAUSE WE NEVER PROVED BEYOND A PREPONDERANCE OF THE EVIDENCE
6 THAT ANY OF THOSE NUMBERS WAS SKIP-TRACED BECAUSE HE HAS A
7 THEORY ABOUT HOW OUR EXPERTS' METHODOLOGY WAS WRONG AND FAILED
8 TO IDENTIFY SKIP-TRACED NUMBERS.

9 SO THE JURY WILL DECIDE IF THEY BELIEVE THAT, THAT OUR
10 EXPERTS' METHODOLOGY WAS SO FLAWED THAT EVERY ONE OF THE PHONE
11 CALLS THAT THEY SAY WAS MADE TO CLASS MEMBERS WASN'T, THEN
12 THEY WILL WRITE A ZERO.

13 BUT THAT'S NOT WHAT'S GOING TO HAPPEN BECAUSE ALL OF THE
14 EVIDENCE IN THIS CASE SHOWS THAT THE CALL LOGS -- THE CALL
15 LOGS STARTED WITH 14 MILLION, OVER 14 MILLION PHONE CALLS.
16 AND THEN SNYDER AND VERKOVSKAYA AND WEIR NARROWED THEM DOWN TO
17 JUST THE CALLS THAT WERE MADE TO THE SKIP-TRACED NUMBERS
18 BELONGING TO CLASS MEMBERS MEETING CERTAIN CRITERIA.

19 AND IF THAT'S RIGHT, THE JURY WILL HAVE -- IF THE JURY
20 WRITES OUR NUMBER, THAT MEANS THEY BELIEVED THAT WE DID THAT
21 CORRECTLY. IF THE JURY WRITES DOWN A ZERO, THAT MEANS THEY
22 BELIEVE THAT WE FAILED TO PROVE THAT THOSE NUMBERS WERE
23 SKIP-TRACED AND WERE MADE TO CLASS MEMBERS.

24 **THE COURT:** SO WHEN YOU GET TO THE -- LET'S TAKE
25 NO. 5. DOES 5 RELATE TO ONLY ONE OF THESE SUBCLASSES OR ALL

1 OF THE SUBCLASSES?

2 **MR. BURSOR:** YOUR HONOR, 5 RELATES TO --

3 **THE COURT:** OR WHICH ONES -- TELL ME -- WE'VE GOT
4 SUBCLASS A, B, C, AND D. WHICH QUESTIONS RELATE TO EACH OF
5 THOSE SUBCLASSES?

6 **MR. BURSOR:** WELL, YOUR HONOR, WE TALKED ABOUT THIS
7 AT THE LAST HEARING THAT WE WANTED TO BREAK OUT THE VERDICT
8 FORM NOT BY SUBCLASSES BUT BY DIALER FOR THE REASONS I
9 EXPLAINED AT THE LAST HEARING BECAUSE THERE COULD BE A
10 POST-TRIAL ISSUE ABOUT ONE DIALER AND NOT ANOTHER DIALER.

11 SO I THINK THIS RELATES TO ALL FOUR CLASSES BECAUSE --
12 PARDON ME.

13 5 RELATES TO THE GLOBAL CONNECT DIALER. SO, YEAH,
14 SKIP-TRACE CLASS 1 INCLUDES PEOPLE CALLED WITH THE GLOBAL
15 CONNECT DIALER. SKIP-TRACE CLASS 2 INCLUDES CLASS MEMBERS WHO
16 RECEIVED CALLS WITH PRERECORDED VOICE.

17 **THE COURT:** RIGHT.

18 **MR. BURSOR:** SO 5 RELATES TO CLASS A AND 6 RELATES TO
19 CLASS B.

20 5 -- SO 5 IS A AND C, AND 6 IS B AND D, I BELIEVE.

21 **MR. ELLIS:** I DON'T THINK THAT'S RIGHT. I THINK 7
22 DEALS WITH THE VIC DIALER.

23 **MR. BURSOR:** WELL, BUT --

24 **THE COURT:** LOOK, LET ME GET -- I'M GOING TO CREATE A
25 CHART HERE SO THAT I HAVE YOUR PERSPECTIVES. AND MAYBE

1 THERE'S OVERLAP, MAYBE THERE'S NOT, BUT I WANT TO KNOW.

2 SO WITH RESPECT TO -- AND IF MULTIPLE VERDICT FORM
3 QUESTIONS RELATE TO SUBCLASSES, LET ME KNOW. BUT I WANT TO
4 KNOW YOUR PERSPECTIVE.

5 SO WITH RESPECT TO SUBCLASS... SO THIS IS SUB A,
6 SKIP-TRACE CLASS 1. WHICH QUESTIONS ON THE VERDICT FORM
7 RELATE TO THAT CLASS?

8 **MR. BURSOR:** MAY I HAVE JUST ONE MOMENT, YOUR HONOR?

9 **THE COURT:** YES. WE'RE GOING TO GO THROUGH EACH OF
10 THESE. SO IF YOU ALL NEED A FEW MINUTES, THAT'S FINE.

11 (PAUSE IN THE PROCEEDINGS.)

12 **MR. BURSOR:** OKAY. SO THERE'S THREE DIALERS.

13 **THE COURT:** RIGHT.

14 **MR. BURSOR:** AND THERE'S TWO THEORIES OF LIABILITY.
15 ONE THEORY OF LIABILITY IS YOU CALLED WITHOUT CONSENT TO A
16 SKIP-TRACED NUMBER AND A SECOND THEORY OF LIABILITY IS YOU DID
17 THAT WITH A PRERECORDED MESSAGE. ALL RIGHT?

18 SO SUBCLASS A INCLUDES THE VIC DIALER AND THE GLOBAL
19 CONNECT DIALER. AND WE ALSO HAVE, YOUR HONOR, AT SOME POINT
20 DURING THE CLASS PERIOD THE GLOBAL CONNECT DIALER BEGAN TO BE
21 REFERRED TO AS THE TCN DIALER. BUT I BELIEVE THOSE TWO
22 DIALERS ARE ONE IN THE SAME, ALTHOUGH THE CALL LOGS CAME OUT
23 THERE WERE SEPARATE CALL LOGS FOR EACH VERSION. MY
24 UNDERSTANDING IS IT WAS UPDATED.

25 **MR. ELLIS:** SO I NEED TO CORRECT TO COUNSEL. SO

1 THERE ARE THREE DISTINCT DIALERS. GLOBAL CONNECT IS NOT TCN.

2 **MR. BURSOR:** WELL, THERE MAY BE A DISPUTE ABOUT THAT
3 THAT WE CAN ADDRESS LATER.

4 BUT QUESTION 4 ON THE VERDICT FORM CONCERNS ONLY THE
5 GLOBAL CONNECT DIALER. JUST ASKS JURORS WHETHER CALLS WERE
6 MADE USING THAT DIALER.

7 **THE COURT:** SO THAT WOULD BE ALL CLASSES, THOUGH, ALL
8 FOUR?

9 **MR. BURSOR:** THAT WOULD CONCERN ALL FOUR CLASSES.
10 QUESTION 5 CONCERNS ALL THE PHONE CALLS MADE WITH THE
11 GLOBAL CONNECT DIALER TO CLASS MEMBERS. SO THAT IS, AGAIN,
12 ALL FOUR CLASSES.

13 QUESTION 6 CONCERNS ONLY THOSE CALLS MADE WITH GLOBAL
14 CONNECT THAT INCLUDED A PRERECORDED MESSAGE. NOW, THOSE TWO
15 NUMBERS ARE GOING TO BE THE SAME BECAUSE WE'VE LIMITED OUR
16 CLASS LIST TO PHONE CALLS THAT THE EXPERTS' ANALYSIS CONCLUDED
17 SHOWED INDICIA THERE WAS A PRERECORDED VOICE, WHICH MEANS THEY
18 WERE ANSWERED AND THEY WERE SIX SECONDS OR MORE IN DURATION.

19 IS THERE ANOTHER CRITERIA OTHER THAN THAT?

20 **MR. KRIVOSHEY:** NO.

21 **MR. BURSOR:** OKAY.

22 SO WE ARE ONLY PRESENTING EVIDENCE ON CALLS THAT WERE
23 ANSWERED AND WERE SIX SECONDS OR LONGER IN DURATION FROM THE
24 GLOBAL CONNECT DIALER.

25 SO, WHEN I STAND UP IN FRONT OF THE JURY IN CLOSING

1 ARGUMENT, I'M GOING TO TELL THEM THAT THE ANSWER TO QUESTIONS
2 5 AND 6 ARE THE SAME. IT'S 501,043 SUBJECT TO POTENTIAL
3 CHANGE IN THAT NUMBER BASED ON WHETHER THERE ARE ANY OPT-OUTS
4 RECEIVED BETWEEN NOW AND THE OPT-OUT DEADLINE BECAUSE IT
5 HASN'T PASSED YET. SO THAT NUMBER MAY GO DOWN.

6 QUESTION 7 CONCERNS ONLY THE VIC DIALER, BUT, AGAIN, THAT
7 IS GOING TO INCLUDE PEOPLE IN ALL FOUR CLASSES. WE DESIGNED
8 THE VERDICT FORM NOT TO GO CLASS BY CLASS BECAUSE THAT'S NOT
9 REALLY IMPORTANT. WHAT'S IMPORTANT IS THE DIALERS BECAUSE OF
10 OUR CONCERN ABOUT POST-TRIAL ISSUES RELATING TO ONE OR OTHER
11 DIALER.

12 SO QUESTION 7 CONCERNS ALL THE CALLS MADE BY THE VIC
13 DIALER --

14 **THE COURT:** WHAT'S THE NUMBER THERE?

15 **MR. BURSOR:** THE NUMBER FOR QUESTION 8 IS CALLS BY
16 THE VIC DIALER TO CLASS MEMBERS IS 2,591, SUBJECT TO POTENTIAL
17 REDUCTION IF THERE ARE OPT-OUTS BETWEEN NOW AND WHEN WE GIVE
18 THE OPENING STATEMENT.

19 AND EVERY ONE OF THOSE CALLS, BECAUSE OUR EXPERTS USED THE
20 CRITERIA THEY USED TO ONLY COUNT THE PHONE CALLS THAT HAD
21 INDICIA OF A PRERECORDED MESSAGE BEING USED, THE ANSWER TO
22 QUESTIONS 8 AND 9 AGAIN THE SAME. AS OF RIGHT NOW IT'S 2,591.
23 THESE ARE ALL IN TABLE 4 OF MR. WEIR'S REPORT.

24 SO QUESTION 8 CONCERNS CLASSES A AND C AND QUESTION 9
25 CONCERN CLASSES B AND D. BUT, AGAIN, THAT'S NOT WHAT'S

1 IMPORTANT. WHAT'S IMPORTANT IS WE WANT IT TO GO DIALER BY
2 DIALER BECAUSE CLASS BY CLASS IS NOT THE BEST WAY TO DO IT
3 HERE.

4 SO THEN QUESTION 10 CONCERNS THE TCN DIALER. NOW, THIS IS
5 WHERE PERHAPS WE'RE GOING TO NEED TO ADDRESS THIS ISSUE
6 BECAUSE I AM NOW HEARING FOR THE FIRST TIME THAT THERE'S A
7 DISPUTE AS TO WHETHER TCN AND GLOBAL CONNECT WERE THE SAME
8 THING.

9 OUR EXPERTS TREATED THEM SEPARATELY. THE TERMINOLOGY OF
10 THE TCN DIALER WAS NOT LEARNED ABOUT UNTIL AFTER THE CLASS
11 CERT ORDER. BUT WE ACTUALLY WERE GOING TO PROPOSE A FIX TO
12 THIS IN THE JURY INSTRUCTIONS. I'M NOT SURE -- WE DON'T HAVE
13 IT CRAFTED FOR TODAY BECAUSE WE REALIZED THIS THIS MORNING.
14 WE THINK IT IS A MINOR ISSUE.

15 BUT QUESTION 10, IN OUR VIEW, CONCERNS ALL FOUR CLASSES
16 BECAUSE WHERE WE USED GLOBAL CONNECT IN THE CLASS CERT ORDER
17 WE NOW UNDERSTAND THAT TO MEAN GLOBAL CONNECT AND TCN AND/OR
18 TCN BECAUSE IT'S THE SAME -- GLOBAL CONNECT BECAME TCN AT SOME
19 POINT DURING THE CLASS PERIOD IS OUR UNDERSTANDING, BUT WE
20 WANT TO DOUBLE-CHECK THAT AND CONFIRM IT BEFORE WE MAKE A
21 PROPOSAL FOR HOW TO REMEDY THAT NARROW ISSUE.

22 AND THEN 11, WE -- 11 CONCERNS, AGAIN, CLASSES A AND C
23 BECAUSE THE CALLS MADE WITH THE TCN DIALER, THE EXPERTS DID
24 NOT LIMIT THEIR ANALYSIS TO ONLY THOSE THAT SHOWED A
25 PRERECORDED MESSAGE. SO OUR CLAIMS CONCERNING THE CALLS MADE

1 WITH THE TCN DIALER ARE SOMEWHAT NARROWER. WE HAVE ONLY ONE
2 THEORY OF LIABILITY ON THAT ONE THAT THE CALLS WERE MADE
3 WITHOUT CONSENT. WE'RE NOT PRESENTING EVIDENCE THAT THE TCN
4 CALLS WERE MADE WITH PRERECORDED VOICES.

5 SO CLASSES B AND D ARE NOT DEALT WITH IN 10 OR 11. BUT,
6 AGAIN, THERE WAS A REASON -- IT WAS NOT AN OVERSIGHT THAT WE
7 DID THIS DIALER BY DIALER INSTEAD OF CLASS BY CLASS BECAUSE --

8 **THE COURT:** I'M NOT -- I DIDN'T SUGGEST IT WAS. I'M
9 TRYING TO UNDERSTAND THE LOGIC.

10 AND WHAT IS THE NUMBER?

11 **MR. BURSOR:** THE NUMBER HERE FOR -- THE ANSWER TO
12 QUESTION 11, WE'RE GOING TO SAY, BASED ON MR. WEIR'S TABLE 4
13 IS 31,064. AGAIN, SUBJECT TO POTENTIAL REDUCTION IF THERE ARE
14 OPT OUTS BETWEEN NOW AND WHEN WE IMPANEL THE JURY.

15 **THE COURT:** ALL RIGHT. MR. ELLIS, YOUR STATEMENTS
16 REGARDING TCN BEING DIFFERENT FROM GLOBAL CONNECT.

17 **MR. ELLIS:** SO, I MEAN, IF WE WENT BACK AND LOOKED AT
18 ALL THE BRIEFING AND EVEN YOUR ORDERS IN THIS CASE, WE WOULD
19 FIND THAT IN ALL OF THOSE ORDERS YOU GOT IT EXACTLY RIGHT WHEN
20 YOU TALKED ABOUT THE EVOLUTION OF THE DIALERS IN THIS CASE.

21 THE VIC IS THE EARLIEST DIALER, YOU MAY RECALL, YOUR
22 HONOR. THAT'S REALLY WHAT WE WERE DEALING WITH BACK IN 2012,
23 2013. IT THEN MORPHED -- WHEN I SAY "MORPHED", BECAME A NEW
24 PLATFORM WITH GLOBAL CONNECT, AND THEN ULTIMATELY TO TCN. SO,
25 YOU KNOW, I KEEP HEARING FROM CLASS COUNSEL THAT THEY DON'T

1 KNOW THESE THINGS, BUT THEY DO.

2 AND, IN FACT, IF YOU LOOK AT PAGE 22 OF THE DRAFT JURY
3 INSTRUCTIONS THAT WERE DEALING ABOUT WHERE THE INTRODUCTION TO
4 A CLASS ACTION IS LAID OUT, YOU WILL SEE IN SKIP-TRACE CLASS 1
5 UNDER A, THAT THEY TALK ABOUT DAKCS VIC DIALER IN GLOBAL
6 CONNECT, AND THEY DON'T TALK ABOUT TCN.

7 YOU CAN THEN GO DOWN TO C ON THAT PAGE, THE NON-DEBTOR
8 CLASS 1, AND YOU SEE THEY TALK ABOUT DAKCS VIC DIALER AND
9 GLOBAL CONNECT.

10 WHAT THEY ARE TALKING ABOUT IN KIND OF CODE, WHAT CLASS
11 COUNSEL IS TALKING ABOUT IN CODE IS THAT IF THE JURY COMES
12 BACK AND FINDS THAT THERE'S A TCN DIALER -- AND, BY THE WAY,
13 NEITHER VIC NOR TCN, THOSE DIALERS WERE NOT USED WITH
14 MR. PEREZ. ONLY GLOBAL CONNECT WAS.

15 SO THE -- LET'S JUST PULL THE SHEET OFF THIS. THE PROBLEM
16 WITH THIS IS, TO THE EXTENT THAT WE ARE USING, YOU KNOW,
17 MR. PEREZ TO BE THE CLASS REPRESENTATIVE OF CLASS MEMBERS THAT
18 WERE CALLED WITH THESE OTHER DIALERS, THERE'S PROBABLY A
19 PROBLEM THERE. AND I THINK THAT'S WHAT CLASS COUNSEL IS
20 ALLUDING TO IN SOME SORT OF POST-TRIAL PROBLEM.

21 BUT SETTING THAT ASIDE, BECAUSE -- SETTING ALL OF THAT
22 ASIDE, AS WE SEE GOING BACK IN THE PROPOSED VERDICT FORM TO
23 NO. 1 WHERE THE -- AND THIS IS ON PAGE 2 OF THE VERDICT FORM,
24 UNDER A, PLAINTIFF PEREZ'S INDIVIDUAL CLAIMS, BUT THIS ISSUE
25 IS FOUND STARTING ON THE THIRD PAGE UNDER B, CLASS MEMBERS

1 CLAIMS, ITEM 4, THERE'S ANOTHER OPTION THAT THE COURT HAS PUT
2 THERE, DID RASH CURTIS OBTAIN CLASS MEMBERS' CELLULAR
3 TELEPHONE NUMBERS VIA SKIP-TRACING AND CALL THEM ON THEIR
4 CELLULAR TELEPHONE DURING THE CLASS PERIOD WITH THE GLOBAL
5 CONNECT DIALER AND WITHOUT THEIR PRIOR CONSENT?

6 NOW, I THINK THERE'S A WHOLE BUNCH OF STUFF IN THERE THAT
7 WILL PROBABLY HAVE TO BE BROKEN DOWN IN A SPECIAL VERDICT, BUT
8 I THINK THE COURT'S -- I KNOW YOU ARE NOT MAKING A FIRM
9 DECISION THERE, BUT THE SKIP-TRACING PART OF THIS IS GOING TO
10 BE KEY.

11 NOW, IF I WAS A COMMITTEE OF ONE DRAFTING THE JURY
12 INSTRUCTIONS, WOULD I HAVE A JURY INSTRUCTION LIKE PROPOSED
13 JURY INSTRUCTION NO. 32 AT PAGE 22 THAT IS THAT DENSE? I
14 PROBABLY WOULD NOT IF I WAS A COMMITTEE OF ONE.

15 I WOULD SAY THAT YOU ARE BEING ASKED TO DETERMINE WHETHER
16 OR NOT THEIR CLASS MEMBERS CALLED WITH AN ATDS WITHOUT PRIOR
17 EXPRESS CONSENT AND BY USING A NUMBER THAT WAS SKIP-TRACED.

18 AND THAT WOULD KIND OF CUT THROUGH SOME OF THE DENSITY
19 HERE BECAUSE I DON'T KNOW IF THIS IS EXACTLY WHAT YOU WERE
20 SAYING, YOUR HONOR, I DO THINK THAT THAT IS GOING TO BE
21 GOBBLEDYGOOK TO A JURY.

22 SO WHEN I CAME IN THIS MORNING, THE THINGS THAT I WANTED
23 TO TALK ABOUT ARE PRECISELY THIS SPECIAL VERDICT FORM AND HOW
24 IT FITS IN WITH THE JURY INSTRUCTIONS.

25 **THE COURT:** WELL, GIVEN WHAT I'VE HEARD AND GIVEN

1 WHAT THE ISSUES ARE, I MEAN, LOOK, I'M NOT HERE TO TAKE SIDES.
2 I'M HERE TO GIVE YOU A FORUM FOR TRYING YOUR CASE IN FRONT OF
3 A JURY.

4 EACH OF YOU HAVE -- IF YOU COULDN'T RESOLVE THIS, IT'S
5 BECAUSE YOU DON'T AGREE AND YOU CAN'T REACH A COMPROMISE,
6 RIGHT? SO FAIR TRIALS ARE ONES WHERE EACH SIDE GETS TO
7 PRESENT WHAT THEY HAVE BASED UPON THE RULES OF EVIDENCE, AND
8 YOU'RE ENTITLED TO A FAIR DECISION BY THE JURY. AND VERDICT
9 FORMS ARE THERE IN PART TO MAKE SURE THAT THE JURY UNDERSTANDS
10 WHAT THEIR JOB IS AND WHAT IT IS THEY ARE BEING SOUGHT TO
11 ANSWER.

12 SO IT SEEMS TO ME BASED UPON WHAT YOU SAY AND WHAT I KNOW
13 OF THE CASE AT THIS STAGE IN THE GAME AND WHERE THINGS ARE, IT
14 SEEMS TO ME THAT IT IS ACCURATE TO SAY THAT... I COULD ASK THE
15 JURY TO STATE THE NUMBER OF CALLS MADE WITH THE DIALER TO
16 CELLULAR TELEPHONE NUMBERS OBTAINED THROUGH SKIP-TRACING
17 DURING THE CLASS PERIOD. BECAUSE THAT'S THE ISSUE FOR THE
18 DEFENSE.

19 SO I DON'T HAVE TO HAVE A SEPARATE QUESTION, BUT IT SEEMS
20 TO ME THAT IT WOULD BE APPROPRIATE TO ADD THAT PHRASE IN THERE
21 BECAUSE THAT'S THE -- THAT'S A BIG ISSUE, AND IT DOESN'T
22 CHANGE THE QUESTION. RIGHT? THAT IS, IT DOESN'T CHANGE THE
23 QUESTION IN TERMS OF WHAT YOUR PROOF IS.

24 **MR. BURSOR:** THAT SOUNDS CORRECT. I MEAN, THE JURY
25 IS BEING ASKED -- THE ISSUE IS HOW IS THE QUESTION WORDED.

1 AND YOUR HONOR'S DRAFT PRESENTED --

2 **THE COURT:** I'M LOOKING AT IT. NO. 5. IF WE LOOK AT
3 NO. 5 AS AN EXAMPLE, OR WE COULD DO IT IN NO. 4, AND PROBABLY
4 4 IS BETTER: DID RASH CURTIS MAKE CALLS WITH ITS GLOBAL
5 CONNECT DIALER TO CLASS MEMBERS' CELLULAR TELEPHONE NUMBERS
6 OBTAINED THROUGH SKIP-TRACING DURING THE CLASS PERIOD WITHOUT
7 THEIR PRIOR WRITTEN CONSENT?

8 THAT SEEMS TO ME TO BE THE QUESTION.

9 **MR. BURSOR:** SO I THOUGHT WHERE YOUR HONOR WAS GOING
10 IS YOU WERE TRYING TO ELIMINATE THE CONCEPT OF CLASS SO THAT
11 YOU DON'T HAVE TO READ THE GOBBLEDYGOOK CLASS DEFINITION.

12 **THE COURT:** LOOK, I'M HAPPY -- I CAN CHANGE THAT --
13 THE REASON THAT THAT PAGE IS IN THERE IS BECAUSE THAT'S THE
14 WAY IN WHICH YOU GAVE IT TO ME. IT WAS A JOINT INSTRUCTION,
15 AND I TEND NOT TO THROW OUT JOINT INSTRUCTIONS WITHOUT HAVING
16 A DISCUSSION.

17 I ACTUALLY THINK THAT THE WAY YOU BROKE IT DOWN WAS A MUCH
18 MORE LOGICAL, SIMPLER STATEMENT OF WHAT THESE VARIOUS CLASSES
19 ARE. SO I CAN CRAFT SOMETHING AS MR. ELLIS SUGGESTED THAT IS
20 MUCH SIMPLER THAN GIVING THEM THE FOUR TECHNICAL COURT-DEFINED
21 CLASSES, AND THEN I CAN SHARE THAT WITH YOU, AND YOU SEE WHAT
22 YOU THINK. BUT I CAN DO IT MUCH SIMPLER THAN WHAT YOU GAVE
23 ME, BUT I PUT IN HERE WHAT YOU GAVE ME.

24 **MR. BURSOR:** SO, YOUR HONOR, I'M VERY AMENABLE TO
25 THAT. BUT MY -- I JUST HAVE ONE CONCERN. IF THAT CAN BE DONE

1 BY STIPULATION, THEN I'M HAPPY TO DO THAT. I'VE DONE --

2 **THE COURT:** IF YOU WANT TO TAKE A CRACK AT IT, I HAVE
3 PLENTY TO DO. SO YOU CAN TAKE A CRACK AT IT. IF YOU GUYS CAN
4 AGREE, THAT'S GREAT.

5 **MR. BURSOR:** EVERY CLASS ACTION TRIAL THAT I'VE EVER
6 DONE, THE JURY HAS BEEN TOLD WHAT THE CLASS WAS THAT WAS
7 CERTIFIED IN LANGUAGE IDENTICAL TO THE CLASS CERT ORDER. SO
8 THAT'S WHY WE DID THIS.

9 **THE COURT:** OKAY.

10 **MR. BURSOR:** OBVIOUSLY THIS IS NOT POETRY HERE, BUT
11 IT'S WHAT --

12 **THE COURT:** BUT HAVE YOU EVER SEEN A NINTH CIRCUIT
13 DECISION THAT SOMEHOW TURNED ON THE COURT'S DESCRIPTION OF THE
14 CLASSES TO THE JURY?

15 **MR. BURSOR:** I HAVEN'T, BUT I'M VERY CONCERNED
16 BECAUSE, FOR EXAMPLE, I KNOW WHEN YOU GIVE CLASS NOTICE, YOU
17 HAVE TO PUT THE CLASS DEFINITION IN THE NOTICE. IT'S ONE OF
18 THE REQUIREMENTS SO PEOPLE CAN TELL IF THEY ARE A CLASS MEMBER
19 OR NOT.

20 **THE COURT:** BUT WE ARE NOT ASKING PEOPLE TO TELL US
21 WHETHER OR NOT THEY'RE --

22 **MR. BURSOR:** BUT WE'RE ASKING JURORS TO SAY HOW MANY
23 PHONE CALLS WERE MADE TO CLASS MEMBERS. AND IF THE PHRASE
24 "CLASS MEMBERS" IS GOING TO BE ON THE VERDICT FORM, THEN THEY
25 NEED TO KNOW WHAT THE CLASS DEFINITION IS.

1 SO I THOUGHT WHERE YOU WERE GOING WAS, YOU -- I THOUGHT
2 WHERE YOU WERE GOING WAS TO ELIMINATE THAT PHRASE FROM THE
3 VERDICT FORM AND JUST SAY HOW MANY PHONE CALLS WERE MADE TO
4 NUMBERS THAT WERE OBTAINED VIA SKIP-TRACING DURING A CERTAIN
5 TIME PERIOD. AND WE CAN JUST WRITE IN THE CLASS PERIOD. WE
6 DON'T NEED TO WRITE CLASS PERIOD, WE CAN JUST PUT THE DATES
7 THERE TO ELIMINATE THE NEED TO INSTRUCT THE JURY ON THE CLASS
8 AT ALL, BUT I ALSO, I WOULD -- THAT WOULD STRIKE ME AS UNUSUAL
9 AND I WOULD BE WORRIED ABOUT THAT.

10 **THE COURT:** LOOK, IF PEOPLE AGREE, THEN THERE IS NOT
11 AN ISSUE. AND I ACTUALLY THINK THAT IT IS OUR JOB TO HAVE
12 JURIES ONLY DECIDE THINGS THAT ARE AT ISSUE, NOT THINGS THAT
13 AREN'T AT ISSUE.

14 SO IF THERE'S AGREEMENT -- IS THERE AGREEMENT ON THE CLASS
15 PERIOD? ARE THERE DATES THAT CAN BE INSERTED?

16 **MR. ELLIS:** I THINK WE DO AGREE. I THINK, ALTHOUGH
17 DO WE HAVE A START DATE IN 2012?

18 **MR. BURSOR:** YOUR HONOR GAVE US A START DATE IN THE
19 ORDER AND THE END DATE IS THE DATE NOTICE IS DISSEMINATED --

20 **MR. ELLIS:** I ASSUME THAT --

21 **MR. BURSOR:** -- WHICH WE NOW HAVE.

22 **MR. ELLIS:** THE START DATE WOULD BE FOUR YEARS BEFORE
23 THE DATE THE COMPLAINT WAS FILED AND WOULD RUN UP UNTIL
24 WHEN -- IS THE NOTICE PERIOD GOING TO END ON FRIDAY?

25 **MR. BURSOR:** IT'S THE DATE THE NOTICE IS

1 DISSEMINATED. SO I AM SURE WE CAN MAKE A STIP AND GIVE THAT
2 TO YOUR HONOR.

3 **MR. ELLIS:** WE CAN DO THAT.

4 **THE COURT:** I'M GOING TO PUT THAT ON YOUR LIST, WHICH
5 IS TO STIPULATE TO THE NOTICE AND WE CAN -- TO THE NOTICE
6 PERIOD, CLASS PERIOD, AND WE CAN CHANGE THAT.

7 **MR. BURSOR:** SO THEN WHEN YOUR HONOR INSTRUCTS THE
8 JURY, YOU CAN PUT THE ACTUAL DATES. YOU DON'T HAVE TO SAY
9 "CLASS PERIOD".

10 **MR. ELLIS:** AND, MR. BURSOR, I AM HAPPY TO WORK WITH
11 YOU OVER THE NEXT COUPLE OF DAYS TO COME UP WITH SOMETHING
12 DIFFERENT THAN --

13 **THE COURT:** WE ARE -- WE ARE A WEEK AWAY FROM TRIAL
14 SO WE ARE GOING TO START USING PROPER LANGUAGE IN THE
15 COURTROOM. IF YOU WANT TO TALK TO HIM, TALK TO HIM IN THE
16 HALL.

17 **MR. ELLIS:** OKAY. I APOLOGIZE, YOUR HONOR.

18 **THE COURT:** IT'S ALL RIGHT.

19 IN TERMS OF -- BACK TO THIS ISSUE OF CLASS MEMBERS, I MEAN
20 WHAT I ASK CAN SAY IS THAT THE COURT HAS PREVIOUSLY DEFINED
21 CLASS MEMBERS. AND THEN SAY, IN GENERAL THIS IS THE WAY IT
22 BREAKS DOWN. AND THEN USE THAT DESCRIPTION AS THE DEFINED
23 TERM FOR WHAT A CLASS MEMBER IS, WHICH THEN GETS TRANSPOSED
24 INTO THE VERDICT FORM.

25 YOU KNOW, IT IS FORM OVER SUBSTANCE TO THINK THAT A JURY

1 IS GOING TO REALLY TAKE THOSE TECHNICAL -- I, FRANKLY, THINK
2 THAT THOSE TECHNICAL CLASS DESCRIPTIONS ARE GOING TO BE LESS
3 INFORMATIVE THAN A DEFINITION THAT SAYS THAT IT'S THE COURT'S
4 DUTY TO DEFINE THE CLASS. THE COURT HAS DONE THAT. SO THAT
5 YOU UNDERSTAND, HERE ARE THE FOUR CLASSES. THERE ARE TWO
6 CLASSES THAT DO THIS, TWO CLASSES THAT DO THAT, AND WE ARE
7 DEFINING THAT AS CLOSE MEMBERS.

8 AGAIN, IF YOU WANT TO TAKE A STAB AT WRITING IT, THAT IS
9 FINE. I DON'T THINK THAT IT IS REVERSIBLE ERROR TO BE MORE
10 CLEAR TO A JURY.

11 **MR. BURSOR:** WELL, YOUR HONOR, MY SUGGESTION WOULD BE
12 THAT WE -- MR. ELLIS AND I BETWEEN US COME UP WITH AN
13 APPROPRIATE PARAPHRASE OF THESE FOUR CLASSES THAT IS ALONG THE
14 LINES THAT YOUR HONOR IS DESCRIBING.

15 I THINK IT CAN BE BOILED DOWN TO ONE SENTENCE; PERSONS
16 WHOSE NUMBERS WERE DIALED WITH THE AUTO DIALERS WHOSE NUMBERS
17 WERE OBTAINED VIA SKIP-TRACING. BUT WE'LL EXCHANGE OUR VIEWS
18 ON THAT AMONGST OURSELVES, AND THEN WE WILL EITHER PRESENT
19 YOUR HONOR WITH A STIPULATED PARAPHRASE OF THE CLASS
20 DEFINITION THAT YOU CAN USE, OR IF MR. ELLIS AND I CANNOT
21 REACH AGREEMENT, WE'LL SUBMIT TO YOU, YOU KNOW, HERE'S THE
22 PLAINTIFF'S VERSION AND HERE'S THE DEFENDANT'S VERSION, AND
23 THEN YOU CAN CHOOSE WHICH ONE THE COURT THINKS IS THE BEST
24 PARAPHRASE.

25 **THE COURT:** OR NOT, DO MY OWN.

1 **MR. BURSOR:** OR DO YOUR OWN, YEAH.

2 **THE COURT:** THAT'S FINE.

3 **MR. BURSOR:** I THINK WE SHOULD DO THAT QUICKLY.

4 **THE COURT:** I THINK THAT'S FINE.

5 SO LET ME -- SO THAT YOU KNOW, THE EVIDENCE -- THE
6 DECISION THAT I MADE, AND THIS IS WHY I CONTINUE TO PUSH BACK
7 ON YOUR NOTION THAT SOMEHOW THE JURY NEEDS TO BE INSTRUCTED
8 ABOUT WHAT I DECIDED.

9 THE EVIDENCE REGARDING PEREZ HAS BOTH INDIVIDUAL VALUE,
10 PROBATIVE VALUE, AND CLASS PROBATIVE VALUE. AND I DO NOT
11 BELIEVE THAT IT IS APPROPRIATE, GIVEN THE LITIGATION THAT HAS
12 OCCURRED ON OTHER ISSUES THAT WILL NOT BE PRESENTED TO THE
13 JURY, FOR THE JURY TO BE PREDISPOSED TO BELIEVE THAT I BELIEVE
14 THAT THAT EVIDENCE MEANS SOMETHING IN PARTICULAR. AND THAT IS
15 THE REASON WHY I WILL NOT INSTRUCT THEM ON MY VIEW OF THE
16 EVIDENCE. SO --

17 **MR. BURSOR:** SO IF I COULD JUST MAYBE MAKE THIS MORE
18 CONCRETE SO THAT WE CAN DEAL WITH WHAT'S ACTUALLY GOING TO
19 HAPPEN INSTEAD OF HYPOTHETICALS.

20 SO IN EVERY CLASS TRIAL THAT I'VE DONE, FIRST THING I DO
21 IS STAND UP AND SAY WHO I REPRESENT. AND, YOU KNOW, YOUR
22 HONOR APPOINTED US TO REPRESENT A CLASS OF PEOPLE WHO HAD
23 THEIR PHONES CALLED WITH AN AUTO DIALER.

24 BECAUSE THERE'S GOING TO BE JURORS WHO ARE GOING TO SAY,
25 MR. BURSOR DIDN'T PROVE TO ME THAT THIS CLASS -- THAT THIS

1 SHOULD BE A CLASS. THERE'S GOING TO BE JURORS WHO ARE GOING
2 TO THINK MAYBE I DON'T WANT TO HAVE A CLASS HERE. THERE
3 WASN'T ANY EVIDENCE THAT THIS CLASS SHOULD BE CERTIFIED. AND
4 I DON'T WANT TO AWARD ANYTHING TO A CLASS. I DON'T KNOW WHO
5 THE CLASS IS. NOBODY PROVED A CLASS TO ME. THAT'S A BIG
6 PROBLEM.

7 I'VE DONE VOIR DIRE -- I'VE DONE FIVE CLASS ACTION JURY
8 TRIALS, WHICH I THINK MAY BE MORE -- WELL, I DON'T KNOW.
9 THERE'S VERY FEW CLASS ACTION JURY TRIALS. BUT IN EVERY ONE
10 OF THOSE, THERE'S BEEN VOIR DIRE WHERE PROSPECTIVE JURORS --
11 YOU KNOW, YOU GET SOME THAT SAY, I DON'T LIKE CLASS ACTIONS.
12 I DON'T THINK THERE SHOULD BE A CLASS ACTION. THEY NEED TO BE
13 TOLD THAT THEY DON'T GET TO MAKE THAT DECISION BECAUSE YOUR
14 HONOR ALREADY MADE THAT DECISION, AND THAT'S WHAT'S HAPPENED
15 IN EVERY CASE I'VE DONE WHERE THERE HAS BEEN A CLASS ACTION
16 JURY TRIAL.

17 **THE COURT:** THAT'S INTERESTING. THAT WAS NOT MY
18 EXPERIENCE. WELL, WE'LL SEE WHAT YOU FIND DURING VOIR DIRE.

19 **MR. BURSOR:** YOUR HONOR, IT IS ESPECIALLY IMPORTANT
20 HERE WHERE IT SEEMS LIKE THE WHOLE DEFENSE STRATEGY IS TO
21 RE-LITIGATE CLASS CERT. IT SEEMS LIKE THAT'S THEIR DEFENSE
22 STRATEGY.

23 **THE COURT:** NO. THE DEFENSE STRATEGY IS THAT THE
24 CALLS WERE NOT OBTAINED BY SKIP-TRACING.

25 **MR. BURSOR:** I DON'T THINK THAT'S RIGHT BECAUSE EVERY

1 TIME --

2 **THE COURT:** OF COURSE YOU DON'T.

3 **MR. BURSOR:** -- EVERY TIME I HEAR MR. ELLIS DESCRIBE
4 THE EVIDENCE HE'S GOING TO PRESENT, HE TALKS ABOUT WHETHER
5 MR. PEREZ -- HE WANTS TO PROVE THAT MR. PEREZ IS NOT THE
6 APPROPRIATE REPRESENTATIVE OF THIS CLASS. THEY DON'T GET TO
7 DECIDE THAT.

8 **THE COURT:** NO, THEY DON'T.

9 **MR. BURSOR:** RIGHT. BUT EVERY TIME HE DESCRIBES WHAT
10 HE'S GOING TO DO NEXT WEEK, THAT'S WHAT HE SAYS.

11 **MR. ELLIS:** I DON'T THINK IT IS. AND IT'S NOT WHAT
12 I'M GOING TO DO. I'VE BEEN PERFECTLY TRANSPARENT ABOUT WHAT
13 OUR POSITION IS. AND IT'S -- I UNDERSTAND THAT THE CLASS HAS
14 BEEN CERTIFIED, BUT CLASS CERTIFICATION IS DIFFERENT THAN
15 WINNING THE TRIAL.

16 **MR. BURSOR:** THE ISSUE, YOUR HONOR, IS THE CLASS WAS
17 CERTIFIED. CERTIFIED BY WHOM? DID I DO IT? DID I RUN AN
18 ADVERTISEMENT IN THE NEWSPAPER TO CERTIFY THE CLASS?

19 **THE COURT:** LOOK, WE WILL EXPLAIN TO THE JURY THAT
20 YOU ARE REPRESENTING A CLASS OF PEOPLE. THAT'S -- BUT I AM
21 NOT HERE TO TAKE SIDES AND I WILL NOT ALLOW YOU TO USE THE
22 OFFICE OF THE JUDICIAL BRANCH. WE -- TO SOMEHOW BOLSTER YOUR
23 CLAIMS.

24 **MR. BURSOR:** IT'S NOT BOLSTERING, YOUR HONOR, BECAUSE
25 I'M GOING TO BRING IN ONE CLASS MEMBER, PEREZ. NOW, THERE'S A

1 RISK THAT THE JURY IS GOING TO GO BACK TO THE ROOM AND SAY,
2 HOW CAN HE HAVE A CLASS OF -- I'M GOING TO SAY THERE'S 46,000
3 SOME PEOPLE IN THIS CLASS, AND HE BROUGHT ONE HERE?

4 **THE COURT:** THAT'S YOUR CHOICE.

5 **MR. BURSOR:** IT'S NOT MY CHOICE. THAT'S ALL WE'RE
6 REQUIRED --

7 **THE COURT:** IT IS YOUR CHOICE BECAUSE THERE ARE BEEN
8 PLENTY OF CLASS ACTIONS WHERE PLAINTIFFS' LAWYERS BRING IN
9 MORE THAN ONE.

10 THERE IS NO REQUIREMENT. ONE IS SUFFICIENT. AND I CAN
11 ADVISE THEM THAT ONE IS SUFFICIENT. BUT IT IS YOUR CHOICE.
12 YOU COULD HAVE FOUND OTHER MEMBERS. CLASS COUNSEL FREQUENTLY
13 DO BECAUSE THEY AREN'T SATISFIED WITH JUST ONE.

14 BUT THAT'S ON YOU. THAT'S NOT ON ME.

15 **MR. BURSOR:** THAT'S AN APPROPRIATE CHOICE FOR US TO
16 MAKE WHEN WE'VE GOT ONE, AND THAT'S FINE, BUT IT IS NOT
17 APPROPRIATE FOR A JUROR TO SAY THEY SHOULD HAVE BROUGHT MORE
18 BECAUSE I DON'T BELIEVE A CLASS SHOULD BE CERTIFIED IF THERE'S
19 ONLY ONE.

20 **THE COURT:** WHAT IF THEY DON'T BELIEVE HIM?

21 **MR. BURSOR:** IF THEY DON'T BELIEVE HIM, THEN THEY
22 SHOULD DISCREDIT HIS TESTIMONY.

23 **THE COURT:** IF THEY DON'T BELIEVE HIM --

24 **MR. BURSOR:** THAT HE'S NOT REQUIRED TO PROVE -- HE'S
25 NOT REQUIRED TO PROVE NUMEROSITY, TYPICALITY, ADEQUACY, ALL

1 THOSE THINGS BECAUSE WE DID THAT, PROVED THEM TO YOU, TO YOUR
2 HONOR. AND THEY DON'T GET TO SECOND-GUESS THAT.

3 AND IF THEY DON'T KNOW THAT, AND THE DEFENSE ARGUMENTS ARE
4 GOING TO BE THIS, YOU KNOW, HE'S NOT AN APPROPRIATE
5 REPRESENTATIVE. THIS CLASS --

6 **THE COURT:** IF HE ARGUES THAT, THEN I CAN INSTRUCT
7 THE JURY.

8 I CERTAINLY HAVEN'T -- YOU KNOW, IN THE LAST ONE I DID,
9 THEY CERTAINLY -- THAT WAS NOT ARGUED BY DEFENSE COUNSEL. IT
10 WASN'T AN ISSUE. AND IF IT BECOMES AN ISSUE, THEN I WILL FIX
11 IT.

12 BUT, YOU KNOW, JUST BECAUSE -- WELL, LIKE I SAID, THE LAST
13 ONE I DID THEY BROUGHT IN MORE PLAINTIFFS THAN JUST THE ONE.
14 AND I UNDERSTAND YOU ARE ENTITLED TO IT. AND I UNDERSTAND
15 THAT THAT IS ALL YOU HAVE TO DO. BUT JUST BECAUSE IT IS ALL
16 YOU HAVE TO DO DOESN'T MEAN IT IS GOING TO BE PERSUASIVE.

17 **MR. BURSOR:** BECAUSE I DON'T HAVE TO PROVE CLASS
18 CERTIFICATION. I DON'T HAVE TO DO THAT AT THE TRIAL.

19 **THE COURT:** YOU DO HAVE TO PROVE BY A PREPONDERANCE
20 OF THE EVIDENCE EACH OF THE ELEMENTS OF YOUR CLAIMS. THAT'S
21 WHAT YOU HAVE TO DO.

22 **MR. BURSOR:** AND TO DO THAT I DON'T NEED ANY MORE
23 THAN ONE.

24 **THE COURT:** WELL, YOU TAKE YOUR SHOT WHETHER OR NOT A
25 JURY BELIEVES IT BASED UPON ONE PERSON. THAT'S ALL IT IS.

1 RIGHT?

2 WE DO HE SAID/SHE SAID TRIALS ALL THE TIME. THEY ARE
3 GOING TO COME IN AND THEY'RE GOING TO HAVE THEIR PEOPLE, AND
4 THEY'RE GOING TO SAY, NO, THAT'S NOT HOW WE DID IT. AND THEN
5 THE JURY IS GOING TO DECIDE.

6 **MR. BURSOR:** WELL, YOUR HONOR, I THINK THAT I COME IN
7 AT A HUGE DISADVANTAGE IF SOME LAWYER WHO CLAIMS TO REPRESENT
8 A CLASS AND THE COURT DOESN'T -- THE JURORS DON'T UNDERSTAND
9 THAT IT WAS YOUR HONOR THAT CERTIFIED THE CLASS, IT WASN'T ME,
10 IT WAS YOUR HONOR THAT APPOINTED THE CLASS REPRESENTATIVE, IT
11 WASN'T ME.

12 **THE COURT:** AND SO WHAT DO YOU WANT THAT TO MEAN?

13 **MR. BURSOR:** I JUST WANT --

14 **THE COURT:** WHAT DO YOU WANT THAT TO MEAN? THAT
15 SOMEHOW I'M TAKING SIDES?

16 **MR. BURSOR:** NO. YOU HAVE MADE A DECISION --

17 **THE COURT:** ALL I'M SAYING IS THAT YOU CAN TRY YOUR
18 CASE. THAT'S ALL I'VE EVER SAID.

19 **MR. BURSOR:** THAT'S NOT TRUE. YOUR HONOR MADE A
20 RULING THAT WE CAN TRY OUR CASE AS A CLASS ACTION.

21 **THE COURT:** RIGHT. BASED UPON THE EVIDENCE. BUT I
22 DIDN'T SAY I AGREED WITH IT.

23 **MR. BURSOR:** ABSOLUTELY.

24 **THE COURT:** I SAID YOU COULD TRY IT.

25 **MR. BURSOR:** AS A CLASS ACTION.

1 **THE COURT:** CORRECT.

2 **MR. BURSOR:** THAT'S WHAT I WANT TO COMMUNICATE TO THE
3 JURY, THAT YOU MADE THAT DECISION. NOT ME. I DIDN'T RUN AN
4 AD IN THE NEWSPAPER TO DO A CLASS ACTION. THIS IS A CLASS
5 ACTION. THE REASON THIS CASE IS A CLASS ACTION IS BECAUSE
6 YOUR HONOR DECIDED THAT THIS CASE --

7 **THE COURT:** THE REASON THIS IS A CLASS ACTION IS
8 BECAUSE YOU BROUGHT THE SUIT. IT'S NOT AS IF I WENT OUT.

9 **MR. BURSOR:** BUT YOU CAN'T -- I CAN'T SHOW UP AND PAY
10 \$400 AT THE FILING CLERK'S OFFICE AND THEN GET A JURY IN THE
11 BOX AND TELL THEM I REPRESENT A CLASS. I HAVE TO HAVE YOUR
12 HONOR APPROVE THAT THROUGH A RIGOROUS PROCESS, WHICH WE DID,
13 AND YOU RULED. AND YOU RULED THAT THIS CASE CAN AND SHOULD BE
14 TRIED ON A CLASS ACTION BASIS.

15 **THE COURT:** I WILL THINK ABOUT IT. IT SOUNDS TO ME
16 LIKE YOU WANT A LEG UP AND I TEND NOT TO GIVE LEGS UP.

17 **MR. BURSOR:** I JUST WANT AN EVEN PLAYING FIELD.

18 **THE COURT:** I AM NOT SURE THAT'S WHAT YOU ARE ASKING
19 FOR, BUT I'LL THINK ABOUT IT.

20 **MR. BURSOR:** YOUR HONOR, IF WE'VE EXHAUSTED THAT
21 SUBJECT, I'D JUST LIKE TO, JUST SO THAT WE CAN HAVE THE
22 HIGHEST PROBABILITY OF SUCCESS IN THE DISCUSSIONS THAT
23 MR. ELLIS AND I ARE GOING TO HAVE AFTER THIS HEARING, IF WE
24 CAN JUST WALK THROUGH THE VERDICT FORM A LITTLE BIT MORE
25 CAREFULLY STEP BY STEP SO THAT WE KNOW EXACTLY WHAT WE NEED TO

1 DO TO GET BACK TO YOU?

2 **MR. ELLIS:** WITH ALL DUE RESPECT, I THINK FROM THE
3 HOUR THAT WE'VE SPENT ON THIS, I THINK I KNOW WHAT WE NEED TO
4 DO, AND I THINK THAT WE SHOULD JUST GET DOWN AND DO THE HARD
5 WORK TO GET IT DONE AND THEN PRESENT IT TO THE COURT.

6 **THE COURT:** I'M AVAILABLE THIS WEEK. I CAN ALWAYS
7 GET ON THE PHONE IF YOU NEED ME TO GET ON THE PHONE.

8 **MR. BURSOR:** SO, THE ONLY THING THAT I WANTED TO
9 CLARIFY, YOUR HONOR, IS QUESTION 1 BECAUSE THE PLAINTIFF DOES
10 NOT NEED TO PROVE SKIP-TRACING TO PROVE HIS CLAIM.

11 QUESTION 1 IS PERFECTLY FINE AS WRITTEN, AND THE OTHER
12 OPTION IS NOT CORRECT AND WILL NOT BE USED. THE ISSUE DOES
13 NOT COME UP UNTIL QUESTION 4.

14 **THE COURT:** I THINK THAT'S RIGHT.

15 **MR. BURSOR:** OKAY.

16 **MR. ELLIS:** SO I JUST -- I AM NOT GOING TO ARGUE IT,
17 I DON'T THINK IT'S RIGHT. I THINK THAT MR. PEREZ DOES NEED TO
18 DEMONSTRATE THAT HIS PHONE NUMBER WAS OBTAINED BY
19 SKIP-TRACING, BUT WE HAVE TALKED ABOUT THIS. I AM MAKING THAT
20 JUST FOR THE RECORD.

21 **THE COURT:** NOTED.

22 ALL RIGHT. LET'S GO THROUGH THE JURY INSTRUCTIONS IN CASE
23 THERE IS ANYTHING ELSE OUT THERE.

24 ARE THERE ANY JURY INSTRUCTIONS THAT YOU WANT TO DISCUSS?

25 **MR. BURSOR:** YES, YOUR HONOR. IF WE COULD START WITH

1 THE PRE-EVIDENCE JURY INSTRUCTIONS?

2 **THE COURT:** GIVE ME THE NUMBERS YOU WANT TO DISCUSS.

3 **MR. BURSOR:** JUST LIMITED TO THE PRE-EVIDENCE
4 INSTRUCTIONS, I WOULD LIKE TO DISCUSS NO. 15, WHICH APPEARS ON
5 PAGE 14.

6 **THE COURT:** OKAY.

7 **MR. BURSOR:** I THINK THAT IS THE ONLY --

8 **THE COURT:** ANY FROM THE DEFENSE?

9 **MR. ELLIS:** NO.

10 **THE COURT:** LET'S GO TO THAT ONE THEN.

11 **MR. BURSOR:** YOUR HONOR, MAY I?

12 **THE COURT:** YOU MAY. I MEAN, THIS IS JUST IN HERE IN
13 CASE YOU AGREE TO ANY STIPULATED FACTS. THE STIPULATED FACTS
14 TO WHICH YOU AGREED I DON'T THINK ARE FOR THE JURY.

15 **MR. BURSOR:** I THINK THEY NEED THEM BECAUSE ONE OF
16 THE REASONS TO STIPULATE TO FACTS IS TO STREAMLINE THE
17 PRESENTATION OF EVIDENCE.

18 **THE COURT:** OKAY. SO LET ME -- I LOOKED AT THEM AND
19 I DIDN'T THINK THERE WAS ANYTHING OF PARTICULAR NOTE. HOLD
20 ON.

21 **MR. BURSOR:** SO I HAVE A VERY SPECIFIC PROPOSAL --

22 **THE COURT:** I'M LOOKING AT DOCKET 291, WHICH ARE YOUR
23 TRIAL STIPULATIONS. WHICH IS THE ONE THAT YOU....

24 **MR. BURSOR:** I THINK THAT CONCERNED EXHIBITS AND
25 AUTHENTICITY, THINGS OF THAT NATURE.

1 **THE COURT:** NO. THIS IS DOCKET NO. 291 ARE THE
2 PROPOSED -- IS THE PROPOSED ORDER FOR TRIAL STIPULATIONS.
3 THAT IS THE ONLY -- THOSE ARE THE ONLY TRIAL STIPULATIONS THAT
4 HAVE BEEN FILED THAT I KNOW OF.

5 **MR. BURSOR:** DO YOU HAVE IT?

6 **THE COURT:** IS THERE A DOCKET NUMBER?

7 **MR. BURSOR:** YES. DOCKET NO. 260, YOUR HONOR. IT'S
8 THE JOINT PRETRIAL CONFERENCE STATEMENT.

9 **THE COURT:** THOSE AREN'T TRIAL STIPS. UNLESS YOU'VE
10 STIPULATED IN THERE, THAT'S WHY I HAVE A SPECIFIC DOCUMENT
11 THAT I ASK YOU TO FILE THAT ARE CALLED "TRIAL STIPULATIONS".

12 **MR. BURSOR:** WELL, YOUR HONOR, ONE OF THE THINGS THAT
13 YOUR HONOR --

14 **THE COURT:** YOU SAID DOCKET -- WHICH DOCKET NUMBER?

15 **MR. BURSOR:** 260. IT'S THE JOINT PRETRIAL CONFERENCE
16 STATEMENT.

17 **THE COURT:** HOLD ON. LET ME GET IT.

18 **MR. BURSOR:** I HAVE ONE HERE IF YOU WOULD LIKE.

19 **THE COURT:** I DON'T WANT YOURS. THANK YOU.

20 (PAUSE IN THE PROCEEDINGS.)

21 **THE COURT:** OKAY.

22 **MR. BURSOR:** DO YOU HAVE DOCKET 260, YOUR HONOR?

23 **THE COURT:** I DO.

24 **MR. ELLIS:** YOUR HONOR, I DON'T HAVE THAT WITH ME. I
25 DIDN'T KNOW WE WERE --

1 **MR. BURSOR:** I CAN GIVE MR. ELLIS THE COPY I HAD FOR
2 YOUR HONOR.

3 **THE COURT:** THAT'S FINE.

4 **MR. ELLIS:** THANK YOU.

5 **MR. BURSOR:** IT'S THE PRETRIAL CONFERENCE STATEMENT,
6 YOUR HONOR, THAT WE FILED IN ADVANCE OF THE FIRST PRETRIAL
7 CONFERENCE. WE FILED IT APRIL 26.

8 I'M SORRY. WE FILED IT FEBRUARY 15TH.

9 **THE COURT:** I HAVE IT.

10 **MR. BURSOR:** SO --

11 **THE COURT:** WHICH IS THE ONE THAT YOU WANT ME TO
12 INSTRUCT THE JURY ON? JUST GIVE ME THE NUMBER.

13 **MR. BURSOR:** IF YOU GO TO PAGE 9.

14 **THE COURT:** I WAS ON PAGE 19 WITH YOUR STIPULATIONS.

15 **MR. BURSOR:** I WAS ON PAGE 9 WITH THE UNDISPUTED
16 FACTS THAT THE PARTIES AGREED TO.

17 **THE COURT:** I SEE. ALL RIGHT.

18 **MR. BURSOR:** WHICH THERE WERE QUITE A FEW, AND --

19 **THE COURT:** OKAY.

20 **MR. BURSOR:** SO THE PARTIES INCLUDED 45 FACTS
21 NUMBERED 1 THROUGH 45 AS UNDISPUTED FACTS.

22 **THE COURT:** I SEE.

23 **MR. BURSOR:** MY UNDERSTANDING WAS, ONE OF THE REASONS
24 WE DID THAT WAS TO STREAMLINE THE PRESENTATION OF EVIDENCE SO
25 WE DON'T HAVE TO RE-PROVE ALL THESE THINGS SO THAT WE CAN GET

1 THE CASE DONE IN 11 HOURS OR LESS, WHICH WAS THE BASIS FOR MY
2 SAYING THAT AT A PRIOR CONFERENCE.

3 SO MY PROPOSAL IS THAT I VIEW THESE AS STIPULATIONS. IF
4 WE FILE A JOINT DOCUMENT SAYING THESE FACTS ARE UNDISPUTED,
5 THEY ARE STIPULATED TO. SO I THINK THAT THEY SHOULD BE
6 INSERTED AT PAGE 14 WITH THE EXCEPTION -- ALL OF THEM SHOULD
7 BE WITH THE EXCEPTION OF THOSE THAT WOULD RELATE ONLY TO
8 PHASE II WILLFULNESS/GOOD FAITH ISSUES.

9 **THE COURT:** OKAY. IT'S BEING PRINTED FOR ME. HOLD
10 ON.

11 (PAUSE IN THE PROCEEDINGS.)

12 **THE COURT:** MR. ELLIS?

13 **MR. ELLIS:** SO BY AND LARGE, LOOKING THROUGH THIS, I
14 WOULD TEND TO AGREE, BUT I'M BEING ASKED TO LOOK AT THIS AGAIN
15 KIND OF ON THE FLY.

16 I WOULD LIKE TO HAVE 24 HOURS TO AGREE OR DISAGREE BY
17 GOING THROUGH AND, AGAIN, I THINK THAT I COULD WORK WITH
18 MR. BURSOR TO COME UP WITH A DOCUMENT.

19 **THE COURT:** DID YOU PRINT THAT, FRANCES?

20 **THE CLERK:** YES.

21 **THE COURT:** THANK YOU.

22 **MR. BURSOR:** YOUR HONOR, I AM NOT SURE IF MR. ELLIS
23 IS DONE, BUT IF I MAY.

24 I DON'T THINK WE NEED TO WORK ON IT BECAUSE WE ALREADY
25 WORKED ON IT WHEN WE AGREED TO IT. AND THE ONLY ISSUE TO ME

1 IS, THERE ARE SIX OF THEM --

2 THE COURT: ALL RIGHT. LET'S GO THROUGH THIS.

3 ANY OBJECTION TO 1?

4 MR. ELLIS: NO.

5 THE COURT: 2?

6 MR. ELLIS: NO.

7 THE COURT: 3?

8 MR. ELLIS: NO. I AM NOT SURE THAT'S RELEVANT, BUT I
9 HAVE NO OBJECTION.

10 THE COURT: 4?

11 MR. ELLIS: NO.

12 THE COURT: 5?

13 MR. ELLIS: NO.

14 THE COURT: 6?

15 MR. ELLIS: NO.

16 THE COURT: 7?

17 MR. ELLIS: NOPE.

18 THE COURT: 8?

19 MR. ELLIS: NOPE.

20 THE COURT: 9?

21 MR. ELLIS: NOPE.

22 THE COURT: 10?

23 MR. ELLIS: NOPE.

24 THE COURT: 11?

25 MR. ELLIS: NOPE.

1 THE COURT: 12?

2 MR. ELLIS: NOPE.

3 THE COURT: 13?

4 MR. ELLIS: NOPE.

5 THE COURT: 14?

6 MR. ELLIS: NOPE.

7 THE COURT: 15?

8 MR. ELLIS: NOPE.

9 THE COURT: 16?

10 MR. ELLIS: NOPE.

11 THE COURT: 17?

12 MR. ELLIS: NOPE.

13 THE COURT: 18?

14 MR. ELLIS: NOPE.

15 THE COURT: 19?

16 MR. ELLIS: NO.

17 THE COURT: 20?

18 MR. ELLIS: NO, YOUR HONOR.

19 THE COURT: 21?

20 MR. ELLIS: GIVEN THE CONVERSATION THAT WE'VE JUST

21 HAD, I DO HAVE SOME HESITATION, BUT IT IS TRUE. SO 21 IS

22 TRUE. SO I GUESS I DON'T, BUT, AGAIN, I'M CONCERNED ABOUT THE

23 IMPRIMATUR OF THE COURT --

24 THE COURT: I'LL LOOK AT 21.

25 22?

1 **MR. ELLIS:** NO OBJECTION.

2 **MR. BURSOR:** I WOULD -- I DON'T THINK 22 IS RELEVANT.

3 **THE COURT:** 23?

4 **MR. ELLIS:** NO OBJECTION.

5 **THE COURT:** 24?

6 **MR. ELLIS:** NO OBJECTION.

7 **THE COURT:** 25?

8 **MR. ELLIS:** NO OBJECTION.

9 **THE COURT:** 26?

10 **MR. ELLIS:** NO OBJECTION.

11 **THE COURT:** 27?

12 **MR. ELLIS:** NO OBJECTION.

13 **THE COURT:** 28?

14 **MR. ELLIS:** NO OBJECTION.

15 **THE COURT:** 29.

16 **MR. ELLIS:** NO OBJECTION.

17 **THE COURT:** 30?

18 **MR. BURSOR:** RELEVANCE.

19 **MR. ELLIS:** NO OBJECTION. IT'S GOOD FOR THE GOOSE,
20 GOOD FOR THE GANDER.

21 **THE COURT:** I GET BOTH OF THAT. I'M MAKING NOTES AS
22 TO WHICH ONES YOU ARE NOW... TAKING YOU EACH WITH A GRAIN OF
23 SALT.

24 LET'S GO. 31?

25 **MR. ELLIS:** NO OBJECTION.

1 **THE COURT:** 32?

2 **MR. ELLIS:** I DON'T THINK THAT'S RELEVANT.

3 **MR. BURSOR:** NO OBJECTION TO THAT ONE.

4 **THE COURT:** ARE YOU ASKING FOR IT?

5 **MR. BURSOR:** YES. I'M ASKING FOR ALL OF THEM EXCEPT
6 THE ONES I OBJECT TO.

7 **THE COURT:** I WANT IT ON THE RECORD.

8 **MR. BURSOR:** OKAY.

9 **THE COURT:** 33?

10 **MR. ELLIS:** NO OBJECTION.

11 **MR. BURSOR:** NO OBJECTION.

12 **THE COURT:** 34?

13 **MR. ELLIS:** AGAIN, I OBJECT TO THAT BECAUSE OF THE
14 LANGUAGE OF THE COURT.

15 **THE COURT:** 35?

16 **MR. ELLIS:** NO OBJECTION.

17 **MR. BURSOR:** NO OBJECTION.

18 **THE COURT:** 36?

19 **MR. BURSOR:** PARDON ME. I'M SORRY. 35 I OBJECT TO.
20 AND I THINK THAT THAT IS A PHASE II ONLY RELEVANCE BECAUSE I
21 DON'T THINK THAT THERE WILL BE EVIDENCE ABOUT MR. REYNOSO
22 PRESENTED IN FRONT OF THE JURY BECAUSE THAT GOES ONLY TO THE
23 ISSUE OF MR. PEREZ'S CONSENT OR LACK OF CONSENT AND A GOOD
24 FAITH BASIS FOR THE BELIEF AND CONSENT.

25 SO 35, WE OBJECT TO RELEVANCE EXCEPT FOR PHASE II.

1 **THE COURT:** COMMENT?

2 **MR. ELLIS:** OKAY. I WANT IT.

3 **THE COURT:** 36?

4 **MR. ELLIS:** NO OBJECTION.

5 **MR. BURSOR:** NO OBJECTION.

6 **THE COURT:** 37?

7 **MR. ELLIS:** NO OBJECTION.

8 **MR. BURSOR:** NO OBJECTION.

9 **THE COURT:** 38?

10 **MR. ELLIS:** NO OBJECTION.

11 **MR. BURSOR:** OBJECTION. THAT IS A PHASE II ONLY
12 RELEVANCE ISSUE FOR THE SAME REASONS AS 35.

13 **THE COURT:** 39?

14 **MR. BURSOR:** SAME OBJECTION.

15 **THE COURT:** 40?

16 **MR. BURSOR:** SAME OBJECTION. AND ADDITIONALLY, YOUR
17 HONOR, WITH 40, IT'S ALSO RULE 403 CONFUSION OF ISSUES
18 OBJECTION.

19 I DON'T KNOW IF YOUR HONOR RECALLS THIS FROM THE CLASS
20 CERT ORDER, BUT THERE WAS A DISCUSSION ABOUT MR. PEREZ AND HIS
21 JOB AS A HEALTHCARE AID. AND IN CONNECTION WITH THAT, IN THE
22 COURSE OF HIS WORK, HE HAD PROVIDED HIS PHONE NUMBER TO SUTTER
23 GENERAL HOSPITAL. AND YOUR HONOR WROTE ABOUT THIS AT SOME
24 LENGTH.

25 SO HE GAVE HIS PHONE NUMBER TO SUTTER GENERAL HOSPITAL FOR

1 REASONS OF HIS JOB, BUT THERE WAS NEVER AN ACCOUNT OR A DEBT
2 THAT PEREZ OWED TO SUTTER, AND IT WAS NEVER REFERRED TO TO THE
3 DEFENDANT, AND SO THAT IS A BIG TIME RULE 403 CONFUSION OF
4 ISSUES THING.

5 **MR. ELLIS:** SO I'M GOING TO WANT IT AND -- FOR THE
6 RECORD. AND IT'S NOT SIMPLY AS MR. BURSOR SAID. MR. PEREZ
7 WAS ALSO TREATED AT SUTTER AND HAD CONSENTED AND GIVEN CONSENT
8 TO SUTTER TO CALL HIS CELL PHONE. THAT'S JUST FOR THE RECORD.

9 **MR. BURSOR:** BUT YOUR HONOR RULED ON CONSENT ALREADY
10 FOR PEREZ.

11 IF ANYTHING, THE ONLY POSSIBLE RELEVANCE IT COULD HAVE IS
12 PHASE II, AND IT DOESN'T HAVE RELEVANCE EVEN FOR PHASE II
13 BECAUSE THIS WAS NEVER -- THIS WAS NEVER COMMUNICATED TO RASH
14 CURTIS UNTIL AFTER THE LAWSUIT WAS FILED, WELL AFTER THE PHONE
15 CALLS WERE MADE.

16 **THE COURT:** ALL RIGHT. 41?

17 **MR. BURSOR:** SAME OBJECTION, YOUR HONOR. 41 IS
18 PHASE II ONLY, BUT IT'S NOT EVEN PHASE II BECAUSE OF THE
19 ISSUES WE JUST DISCUSSED.

20 YOUR HONOR HAS ADDRESSED THIS IN A PRIOR ORDER, SO I WOULD
21 ENCOURAGE YOUR HONOR TO CHECK THAT PRIOR ORDER YOU MADE.

22 **MR. ELLIS:** SO I'M GOING TO WANT IT. IN TERMS OF
23 403, THE JURY IS APPARENTLY GOING TO BELIEVE THAT THIS WAS AN
24 IMMACULATE SET OF PHONE CALLS TO MR. PEREZ JUST OUT OF THE
25 BLUE. THERE'S GOING TO HAVE TO BE SOME BACKGROUND FOR AN

1 UNDERSTANDING OF HOW THIS HAPPENED.

2 MR. BURSOR: IT DIDN'T HAPPEN THIS WAY, AND YOUR
3 HONOR ALREADY DETERMINED THAT.

4 MR. ELLIS: YOU JOINED IN THIS UNDISPUTED FACT, TOO.

5 MR. BURSOR: I DON'T DISPUTE THAT FACT IS TRUE. THIS
6 IS A TRUE FACT. BUT YOUR HONOR DETERMINED THAT THIS FACT WAS
7 NOT PERTINENT TO HOW RASH CURTIS GOT HIS PHONE NUMBER.

8 THE COURT: 42?

9 MR. ELLIS: NO OBJECTION.

10 MR. BURSOR: NO OBJECTION.

11 THE COURT: 43?

12 MR. ELLIS: NO OBJECTION.

13 MR. BURSOR: NO OBJECTION.

14 THE COURT: 44?

15 MR. ELLIS: NO OBJECTION.

16 MR. BURSOR: SAME OBJECTION, YOUR HONOR.

17 THE COURT: ALL RIGHT. 45?

18 MR. ELLIS: AGAIN, NO OBJECTION TO THE MEAT OF THE
19 STATEMENT. WHAT I OBJECT TO IS SAYING THE COURT HAS ALREADY
20 DETERMINED.

21 THE COURT: ALL RIGHT. I'LL LOOK AT THEM.

22 MR. BURSOR: NO OBJECTION, YOUR HONOR. I WOULD TAKE
23 OUT THE DOCKET NUMBERS, BUT NO OBJECTION.

24 THE COURT: OKAY.

25 MR. BURSOR: YOUR HONOR, IF I MAY, JUST ONE MORE NOTE

1 ON THIS POINT, IS THAT 44, WHICH WE OBJECT TO, 44 IS VERY
2 IMPORTANT BECAUSE THAT'S THE BASIS FOR ALL OUR OBJECTIONS TO
3 THE USE OF THIS MATERIAL EVEN IN PHASE II BECAUSE 44 SAYS IT'S
4 UNDISPUTED THAT RASH CURTIS DID NOT OBTAIN THE INFORMATION
5 FROM SUTTER UNTIL AFTER THE CASE COMMENCED, WHICH IS WHY THE
6 EVIDENCE CAN'T EVEN BE RELEVANT IN PHASE II BECAUSE THEY
7 COULDN'T HAVE HAD -- THIS COULDN'T HAVE BEEN THEIR BASIS FOR A
8 GOOD FAITH BELIEF TO MAKE PHONE CALLS IN THE PAST WHEN THEY
9 DIDN'T GET THE INFORMATION UNTIL THE FUTURE.

10 SO AT THE TIME THE PHONE CALLS WERE MADE, THEY DIDN'T HAVE
11 ANY OF THE INFORMATION FROM SUTTER.

12 **MR. ELLIS:** MAY I RESPOND JUST FOR THE RECORD?

13 **THE COURT:** YOU MAY.

14 **MR. ELLIS:** SO, AGAIN, THIS IS A MISCHARACTERIZATION
15 OF THE EVIDENCE. WHY, WHEN ALL OF THE DEMOGRAPHIC INFORMATION
16 WITH RESPECT TO MR. REYNOSO CAME ON OVER ELECTRONICALLY WHEN
17 THE DEBT WAS ASSIGNED, WE THEN WENT BACK IN DISCOVERY AND
18 ACTUALLY GOT THE RECORDS THAT CONFIRMED THE DEMOGRAPHIC
19 INFORMATION.

20 THANK YOU.

21 **THE COURT:** ALL RIGHT. NEXT SET OF INSTRUCTIONS;
22 ANYTHING YOU WANT TO TALK ABOUT?

23 **MR. BURSOR:** YES, YOUR HONOR. IN THE --

24 **THE COURT:** JUST GIVE ME THE NUMBERS FIRST.

25 **MR. BURSOR:** PAGE 19 --

1 **THE COURT:** OTHER THAN WHAT WE HAVE TALKED ABOUT.

2 **MR. BURSOR:** SORRY. WE HAVE AN ISSUE ON PAGE 19 AND
3 PAGE 24.

4 **THE COURT:** ALL RIGHT. ANYTHING ELSE?

5 **MR. BURSOR:** SHOULD I JUST GO WITH THAT?

6 **THE COURT:** NO.

7 DEFENSE, ANYTHING?

8 **MR. ELLIS:** NO, YOUR HONOR.

9 **THE COURT:** ALL RIGHT. SO LET'S GO TO PAGE 19.

10 **MR. BURSOR:** MAY I PROCEED?

11 **THE COURT:** YOU MAY.

12 **MR. BURSOR:** YOUR HONOR, ON PAGE 19, DOWN AT LINE 24,
13 THERE'S A STATEMENT THAT SAYS:

14 "THE DEFENDANT DENIES THIS CLAIM AND ALSO CONTENTS
15 THAT ITS CALLS TO PLAINTIFF'S CELLULAR TELEPHONE
16 NUMBER WERE WITH PRIOR EXPRESS CONSENT. THE
17 DEFENDANT HAS THE BURDEN OF PROOF ON THESE
18 AFFIRMATIVE DEFENSES. THE PLAINTIFF DENIES
19 DEFENDANT'S AFFIRMATIVE DEFENSES."

20 AND THEN THERE'S A FOOTNOTE.

21 OUR VIEW IS THAT SHOULD ALL BE STRICKEN BECAUSE YOUR HONOR
22 HAS ALREADY DETERMINED THE ISSUE OF CONSENT. SO THE JURY
23 SHOULD NOT BE TOLD DEFENDANT DISPUTES CONSENT. SO EITHER
24 EVERYTHING BELOW LINE 24 SHOULD BE STRICKEN OR, ALTERNATIVELY,
25 IT SHOULD BE THE DEFENDANT DENIES THIS CLAIM PERIOD. BUT THAT

1 WOULD BE REDUNDANT OF 23.

2 SO I THINK FROM 24 DOWN HAS TO BE STRICKEN, AND THAT IS
3 CONSISTENT WITH YOUR HONOR'S INSTRUCTION THAT YOU PUT ON
4 PAGE 20 WHERE YOU SAY PLAINTIFF DOES NOT HAVE TO PROVE THAT
5 DEFENDANT LACKED PRIOR EXPRESS CONSENT.

6 AND ALSO I THINK THERE'S ELSEWHERE WHERE YOU ARE
7 INSTRUCTING THE JURY THAT YOU ALREADY DETERMINED THERE WAS NO
8 PRIOR EXPRESS CONSENT.

9 **MR. ELLIS:** YOUR HONOR?

10 **THE COURT:** YOU MAY.

11 **MR. ELLIS:** SO, AGAIN, I WANT TO PRESERVE THAT I DO
12 BELIEVE THAT WE HAD PRIOR EXPRESS CONSENT AS I'VE ARGUED OVER
13 THE LAST COUPLE OF YEARS. BUT FOR PURPOSES OF GIVEN YOUR
14 RULINGS, FOR PURPOSES OF THIS, I ACTUALLY AGREE WITH
15 MR. BURSOR AND THAT SHOULD BE TAKEN OUT.

16 **THE COURT:** I AGREE AS WELL. AGAIN, THESE WERE
17 THINGS THAT YOU ALL PROPOSED, AND YOU DIDN'T HAVE SOME OF MY
18 RULINGS, SO I'LL FIX THAT. AND THEN BASED UPON OUR DISCUSSION
19 THIS MORNING, PAGE 24 IT SEEMS TO ME IT PROBABLY SHOULD COME
20 OUT.

21 AGREED?

22 **MR. BURSOR:** AGREED, YOUR HONOR.

23 **MR. ELLIS:** CORRECT, YOUR HONOR.

24 **THE COURT:** IS THERE ANYTHING ELSE THAT YOU WANT TO
25 DISCUSS IN THE JURY INSTRUCTIONS?

1 **MR. ELLIS:** ACTUALLY FOR THE RECORD, YOUR HONOR, I
2 THINK YOU SAID PAGE 24. I THINK IT'S PAGE 19 AT LINES 24
3 THROUGH --

4 **THE COURT:** NOW LOOK AT PAGE 24.

5 **MR. ELLIS:** OKAY. I AM SORRY.

6 **THE COURT:** 24 IS THE --

7 **MR. BURSOR:** IT'S THE TREBLE DAMAGES INSTRUCTION,
8 YOUR HONOR.

9 **THE COURT:** DO YOU SEE THAT, MR. ELLIS?

10 **MR. ELLIS:** I DO.

11 **THE COURT:** SO IT SEEMS TO ME THAT COMES OUT.

12 **MR. ELLIS:** I AGREE.

13 **THE COURT:** OKAY. SO NOTHING ELSE THEN ON JURY
14 INSTRUCTIONS?

15 **MR. BURSOR:** YOUR HONOR, ONE OTHER -- I MENTIONED IT
16 BEFORE. I DON'T WANT TO BE REDUNDANT ON IT, BUT THE CLASS
17 DEFINITION ISSUE ON 22 I THINK WE ARE GOING TO ADDRESS BOTH
18 THE TCN ISSUE AND WHAT IS THE APPROPRIATE -- THE TCN DIALER
19 ISSUE, NUMBER ONE, WHICH MAYBE WE ARE NOT GOING TO REACH
20 AGREEMENT ON, BUT ALSO NUMBER TWO, THE APPROPRIATE PARAPHRASE
21 FOR THAT IF YOU WANT TO USE IT THERE.

22 **THE COURT:** OKAY. BUT YOU'RE GOING TO TAKE A STAB AT
23 IT IS MY UNDERSTANDING.

24 **MR. BURSOR:** YES. FROM MY PERSPECTIVE, I WOULD
25 APPRECIATE YOUR HONOR GIVING US A TIGHT DEADLINE ON US DOING

1 THAT.

2 **THE COURT:** WHEN DO YOU THINK YOU CAN GET IT BACK TO
3 ME?

4 **MR. BURSOR:** BY WEDNESDAY?

5 **MR. ELLIS:** WEDNESDAY AT FIVE PACIFIC STANDARD?

6 **MR. BURSOR:** YEAH.

7 **MR. ELLIS:** THAT'S FINE.

8 **THE COURT:** SO REVISED INSTRUCTIONS DUE BY WEDNESDAY
9 AT FIVE P.M. THAT WILL INCLUDE THE REVISED INSTRUCTION ON
10 CLASS ACTION, THE STIPULATION ON THE CLASS PERIOD WHICH WOULD
11 BE IN THERE AS WELL, AND I THINK CLASS ACTION/CLASS MEMBERS
12 DEFINED.

13 **MR. ELLIS:** YOUR HONOR, IS THE COURT GOING TO -- ON
14 THESE UNDISPUTED FACTS THAT WE JUST WENT THROUGH, IS THE COURT
15 GOING TO DRAFT SOMETHING OR DOES IT WANT US TO PUT
16 SOMETHING --

17 **THE COURT:** I'M NOT EXPECTING YOU TO DRAFT ANYTHING.
18 I AM GOING TO GO THROUGH AND DECIDE, AND WILL LET YOU KNOW
19 WHICH OF THOSE WILL GET INCLUDED IN THE JURY INSTRUCTIONS ON
20 THE PRE-INSTRUCTION SET. THEY WON'T GO IN THE
21 POST-INSTRUCTION SET. AND THEN YOU WILL KNOW IF THERE'S
22 SOMETHING ELSE YOU NEED TO PROVE OR WE CAN TALK ABOUT IT AT
23 THE NEXT GO AROUND.

24 **MR. BURSOR:** YOUR HONOR, WOULD IT BE HELPFUL FOR US
25 TO PROVIDE THAT DOCUMENT TO YOU IN A WORD FORMAT TO MAKE YOUR

1 JOB EASIER?

2 **THE COURT:** YES. IT WOULD SAVE A FEW MINUTES.

3 **MR. BURSOR:** WE WILL DO THAT.

4 **THE COURT:** THAT WOULD BE APPRECIATED.

5 **MR. ELLIS:** DO YOU THINK THAT MAY GO INTO THE JURY
6 BINDER THAT YOU'RE GOING TO BE PUTTING TOGETHER?

7 **THE COURT:** GIVEN HOW LENGTHY IT IS, YES. I
8 TYPICALLY -- I WOULDN'T GIVE THEM ALL THE INSTRUCTIONS, BUT
9 GIVEN HOW MANY FACTS THERE ARE, IT SEEMS TO ME TO BE
10 APPROPRIATE TO GIVE THAT TO THEM.

11 NOW, WHAT I COULD DO IS JUST GIVE THEM A DOCUMENT THAT
12 SAYS THESE ARE THE STIPULATED FACTS RATHER THAN ALL OF THE
13 INSTRUCTIONS, WHICH I THINK IS EASIER, BUT IF YOU HAVE ANY
14 COMMENTS ON THAT FRONT, LET ME KNOW.

15 **MR. BURSOR:** YOUR HONOR, IT'S... I'VE SEEN JUDGES DO
16 IT BOTH WAYS WHERE THEY -- THE JUDGE ALWAYS SEEMS TO READ THE
17 JURY INSTRUCTIONS TO THE JURORS.

18 **THE COURT:** WE HAVE TO READ THEM.

19 **MR. BURSOR:** SOME JUDGES PRINT THEM OUT AND SEND IT
20 INTO THE ROOM AND SOME DON'T. I WANT TO KNOW WHICH KIND OF
21 JUDGE YOUR HONOR IS.

22 **THE COURT:** POST-INSTRUCTIONS WILL ABSOLUTELY GO INTO
23 THE JURY ROOM. I DON'T TYPICALLY GIVE THEM THE
24 PRE-INSTRUCTIONS SET BUT I ALSO DON'T TYPICALLY HAVE 40
25 STIPULATED FACTS.

1 SO MY VIEW IS THAT I WILL GIVE THEM THE PRE-INSTRUCTIONS
2 WITH THE STIPULATED FACTS THAT I BELIEVE SHOULD GO IN THERE.
3 MY PREFERENCE IS TO JUST GIVE THEM THE STIPULATED FACTS AND TO
4 NOT GIVE THEM THE OTHER PAGES OF GENERIC INSTRUCTIONS. BUT IF
5 YOU FEEL STRONGLY ON THAT, NOW IS THE TIME TO LET ME KNOW.

6 **MR. BURSOR:** I FEEL STRONGLY THAT YOUR HONOR'S
7 PREFERENCE IS CORRECT AND THAT YOUR HONOR SHOULD GIVE THEM
8 JUST THE STIPULATED FACTS FROM THE PRE-INSTRUCTION AND THEN
9 ALL OF THE INSTRUCTIONS FROM THE POST-TRIAL INSTRUCTIONS.

10 **MR. ELLIS:** I AGREE.

11 **THE COURT:** ALL RIGHT. GREAT. THAT'S WHAT I WILL DO
12 THEN.

13 OKAY. THE OTHER THING THAT YOU WANTED TO TALK ABOUT WERE
14 EXHIBITS.

15 NOW I HAVE GONE THROUGH AND I HAVE -- LET'S DO THE
16 LOGISTICS FIRST. I BELIEVE I NOW HAVE ALL OF YOUR EXHIBITS,
17 SO I DON'T KNOW THAT YOU NEED TO BRING IN EVERYTHING ELSE.
18 THAT IS, I BELIEVE I HAVE A COPY SET THAT IS THE COURT.

19 YOU DO HAVE TO BRING IN THE OFFICIAL EXHIBIT LIST -- THE
20 OFFICIAL SET OF EXHIBITS THAT GO -- THAT MY COURTROOM DEPUTY
21 MANAGES AND THAT WILL, IN FACT, GO INTO THE JURY ROOM.

22 WE'VE GOTTEN THOSE IN VARIOUS WAYS. I DON'T KNOW IF YOU
23 WANT TO PUT THOSE IN FILE FOLDERS AND THEN YOU PULL OUT THE
24 FILE FOLDER AND THAT'S THE ONE THAT HAPPENS, OR IF YOU'VE GOT
25 THEM IN BINDERS, BUT SHE NEEDS -- SHE'S GOING TO NEED THE

1 OFFICIAL SET WITH THE TAG, AND I DON'T TOUCH THOSE. SO....

2 **MR. ELLIS:** SO WE HAVE GOT ALL OF OURS PUT TOGETHER.
3 WHAT I WOULD -- I WAS GOING TO BRING THREE SETS DOWN. YOU
4 KNOW, ONE FOR THE DEPUTY, THE OFFICIAL SET, ONE FOR YOU, ONE
5 FOR THE WITNESSES. AND WHAT I THOUGHT THAT WE DO SINCE WE
6 PULLED, YOU KNOW, WE HAVE STIPULATIONS, PULLING DOCUMENTS AND
7 STUFF, WHAT I WOULD DO, YOUR HONOR, IS I WOULD TAKE YOUR SET
8 BACK BECAUSE I THINK THIS IS OUT OF DATE, UNLESS YOU HAVE
9 WRITTEN ON IT. I JUST DON'T KNOW IF YOU WANT TWO SETS --

10 **THE COURT:** I DON'T WANT TWO SETS. I ONLY WANT ONE
11 SET.

12 WHAT DO YOU MEAN IT IS OUT OF DATE?

13 **MR. ELLIS:** SINCE THE LAST TIME WHEN WE BROUGHT THE
14 EXHIBITS IN AND WE TALKED ABOUT THEM, YOU KNOW, THEN WE TALKED
15 ABOUT WE'RE TAKING THE COMPLAINT OUT AND THE ANSWER OUT --

16 **THE COURT:** OKAY. IF YOU ARE JUST TAKING THINGS OUT,
17 LEAVE MY SET ALONE. DO NOT BRING ME ANOTHER SET.

18 **MR. ELLIS:** OKAY.

19 **THE COURT:** BECAUSE I DON'T KNOW IF I WROTE OR TAGGED
20 OR CIRCLED SOMETHING AND I DON'T LIKE TO GIVE THOSE BACK.

21 **MR. ELLIS:** WOULD YOU LIKE ANOTHER SET FOR YOUR LAW
22 CLERK?

23 **THE COURT:** I DON'T THINK SO. THIS IS A BENCH
24 TRIAL -- IT'S NOT A BENCH TRIAL. I WOULD IF IT WAS A BENCH
25 TRIAL, BUT I DON'T NEED A THIRD SET.

1 AND DO WE HAVE THEM ELECTRONIC? NO. I DON'T KNOW THAT WE
2 NEED THEM ELECTRONIC. BUT SOME OF THESE THINGS -- SO ON THE
3 PLAINTIFFS' SIDE, DO YOU HAVE A QUESTION OF DELIVERY?

4 **MR. BURSOR:** YES.

5 WELL, WE CAN PROVIDE A SET FOR THE COURTROOM DEPUTY. I
6 DON'T HAVE ANY QUESTION ABOUT THAT. WE CAN DO THAT IN ANY
7 FORMAT THE DEPUTY PREFERS OR YOUR HONOR PREFERS.

8 MY QUESTION HAS TO DO WITH THE USE OF EXHIBITS DURING THE
9 TRIAL AND HOW THEY ARE GOING TO BE SHARED WITH THE JURORS. I
10 KNOW YOUR HONOR HAS THIS PROJECTOR, AND IT WORKS GREAT. IF
11 THERE IS A LIVE WITNESS ON THE STAND AND WE ARE HERE WORKING
12 WITH THE DOCUMENTS, BUT WE HAVE THREE WITNESSES WHO ARE GOING
13 TO TESTIFY BY VIDEOTAPE DEPOSITION. AND SO I CAN'T MANIPULATE
14 THE EXHIBITS WHILE THE VIDEO IS PLAYING. IT IS NOT GOING TO
15 WORK.

16 SO WHAT I WOULD PROPOSE IS THAT FOR THOSE WITNESSES, WE BE
17 PERMITTED TO HAND THE JURORS A BINDER THAT HAS THE EXHIBITS
18 THAT THE -- THAT THEY ARE GOING TO SEE THE WITNESS DISCUSS ON
19 THE SCREEN. YOU WILL SEE A LOT OF TESTIMONY THAT IS PLAYED ON
20 THE VIDEOTAPE IS, DO YOU HAVE EXHIBIT 24? CAN YOU TURN TO
21 PAGE 19? DO YOU SEE WHERE IT SAYS THIS? AND THEN TESTIMONY
22 ABOUT THAT POINT. AND IT'S HARD TO FOLLOW UNLESS YOU ALSO
23 HAVE THE DOCUMENT EITHER ON THE ELMO OR IN YOUR HAND.

24 SO WE KNOW -- I THINK ALL OF THOSE EXHIBITS ARE STIPED TO
25 ADMIT SO THEY ARE IN EVIDENCE. AND IT'S A RELATIVELY SMALL

1 NUMBER. SO WHAT MY EXPECTATION WOULD BE IS THAT DURING THE
2 DAY, THE DAY OR DAYS THAT THE VIDEOS ARE PLAYED, WHAT I WOULD
3 LIKE TO DO IS HAVE EIGHT BINDERS FOR THE EIGHT JUROR THAT EACH
4 HAS THE FOUR OR FIVE DOCUMENTS IN THE BINDER TABBED SO THAT
5 WHEN THEY SEE THE WITNESS FLIP TO THE PAGE, THEY CAN ALSO FLIP
6 TO THE PAGE AND FOLLOW WHAT IS BEING SAID.

7 **THE COURT:** ANY OBJECTION?

8 **MR. ELLIS:** NO.

9 **THE COURT:** I NEED YOU TO GIVE ME ONE OF THOSE
10 BINDERS, TOO. THE JURY DOESN'T GET ANYTHING I DON'T GET AND
11 MAKE SURE YOU HAVE AN EXTRA COPY FOR MR. ELLIS SO WE ALL NEED
12 TO BE ON THE SAME PAGE. NO ONE GETS ANYTHING THAT THE OTHER
13 SIDE DOESN'T GET.

14 **THE CLERK:** ARE THEY GOING TO MATCH THE EXHIBIT
15 NUMBERS?

16 **THE COURT:** SO THERE SHOULD BE A STIPULATION BY THE
17 PARTIES THAT -- AND SO YOU NEED TO LET THEM KNOW, THAT EITHER
18 YOU CAN SAY IT TO THE JUROR BEFORE THE TESTIMONY IS PLAYED OR
19 I CAN DO IT, BUT THAT THERE IS A STIPULATION THAT IN THE
20 TESTIMONY BEING PLAYED ON THE VIDEOTAPE, EXHIBIT 18 IS
21 EXHIBIT -- IS TRIAL EXHIBIT 504.

22 **MR. BURSOR:** YOUR HONOR, THAT SHOULD NOT BE NECESSARY
23 BECAUSE WE MAKE SURE TO USE THE SAME EXHIBIT NUMBERS FOR TRIAL
24 THAT WE USED AT THE DEPOSITION SO I THINK IT'S GOING TO BE THE
25 SAME IN EVERY INSTANCE.

1 **THE COURT:** I KNOW THE LAST ORDER I DID I WAS USING
2 TWO DIFFERENT NUMBERS. SO 504 AND 506 WERE 18 AND 19 OR
3 SOMETHING LIKE THAT, AND SOME OTHER ITERATION. IF IT IS THE
4 SAME, GREAT. IF IT IS NOT THE SAME, I WANT TO MAKE SURE YOU
5 HAVE A STIPULATION WORKED OUT IN ADVANCE.

6 **MR. ELLIS:** RIGHT.

7 **MR. BURSOR:** UNDERSTOOD.

8 **THE COURT:** OKAY.

9 **MR. ELLIS:** YOUR HONOR, IN THAT REGARD, JUST TO MAKE
10 SURE, AS YOU WELL KNOW, IN THE MORNING OF TRIAL DAYS THINGS
11 ARE GOING FAST, THAT I'M NOT SEEING THIS FOR THE FIRST TIME
12 THAT MORNING SO IF I HAVE AN OBJECTION --

13 **THE COURT:** IT SHOULD BE 24 HOURS IN ADVANCE AT A
14 MINIMUM.

15 **MR. BURSOR:** WELL, THEY HAVE HAD THE DESIGNATIONS
16 SINCE JANUARY AND THERE'S NO OBJECTIONS TO THEM --

17 **THE COURT:** THEY NEED TO SEE THE BINDER SO WE MAKE
18 SURE -- THERE ARE TOO MANY TIMES IN TRIAL WHERE SOMEONE SAYS
19 THEY FORGOT TO DO X. GIVE THEM THE BINDER 24 HOURS IN
20 ADVANCE, IF NOT MORE. THAT'S --

21 **MR. BURSOR:** WILL DO.

22 **THE COURT:** ALL RIGHT.

23 **MR. BURSOR:** YEP.

24 **THE COURT:** IF IT'S GOING TO THE JURY, THAT'S WHAT I
25 WANT DONE.

1 **MR. BURSOR:** YOUR HONOR, MAY WE DO -- IT'S SUCH A
2 SMALL NUMBER OF DOCUMENTS. I THINK IT IS FEWER THAN TEN
3 DOCUMENTS. CAN WE DO ONE BINDER THAT HAS THEM ALL? THERE'S
4 GOING TO BE THREE WITNESSES. RATHER THAN THREE DIFFERENT
5 BINDERS?

6 **THE COURT:** THAT'S FINE. THAT'S BETTER.

7 **MR. ELLIS:** I AGREE.

8 **THE COURT:** ARE THERE ANY EXHIBITS THAT YOU WANT THE
9 JURY TO HAVE, IN WHICH CASE IT WOULD BE BETTER TO HAVE THEM
10 ALL IN ONE?

11 **MR. ELLIS:** I DON'T THINK SO. AS OF RIGHT NOW I
12 THINK WE'RE FINE.

13 **THE COURT:** OKAY. ARE THERE GOING TO BE EXHIBITS
14 THAT ARE BEST PROVIDED TO THE JURY IN ELECTRONIC FORMAT? AND
15 BY THAT I MEAN LIKE, YOU KNOW, WHERE THE PRINT IS SO SMALL
16 THAT HAVING IT ELECTRONICALLY AVAILABLE WOULD ALLOW THEM TO
17 MAGNIFY?

18 **MR. ELLIS:** I THINK THERE MAY BE ON SOME OF THE
19 SPREADSHEETS THAT WERE PUT TOGETHER BY PLAINTIFFS' EXPERTS.

20 **MR. BURSOR:** THE ANSWER, YOUR HONOR, IS I DON'T KNOW.
21 BUT WE WORKED HARD TO MAKE SURE THE SPREADSHEETS WE ARE GOING
22 TO USE IN FRONT OF THE JURY ARE THE ONE-PAGE EXCERPTS AND THAT
23 THEY ARE VERY LEGIBLE. AND I ANTICIPATED THAT THOSE I WOULD
24 USE ON THE PROJECTOR. BUT I ALWAYS PREFER TO HAVE THE JURORS
25 HAVE IT IN THEIR HAND.

1 **THE COURT:** I DON'T TEND TO DO THAT -- I DON'T TEND
2 TO LET THEM DO THAT UNLESS EVERYBODY IS AGREEING THAT THE JURY
3 IS GOING TO TAKE IN EXHIBIT BINDERS, OR SOMETHING LIKE THAT.

4 **MR. BURSOR:** WELL --

5 **THE CLERK:** THEY ALL HAVE SCREENS. THEY CAN SEE THE
6 DOCUMENT.

7 **MR. BURSOR:** THAT'S WHY MY REQUEST FOR THE BINDERS
8 RELATED ONLY TO THE VIDEOTAPE. SO YOUR HONOR'S PREFERENCE IS,
9 IF IT'S NOT THAT SITUATION, IF IT'S A LIVE WITNESS, WE CAN USE
10 THE PROJECTOR, YOU WANT US TO DO THAT AND YOU DON'T WANT THE
11 JURORS TO HAVE IT IN THEIR HAND.

12 **THE COURT:** I TAKE IT YOU ARE GOING TO SEEK TO ADMIT
13 CERTAIN OF THESE CHARTS?

14 **MR. BURSOR:** THEY HAVE BEEN STIPED TO ADMIT. THERE'S
15 A SMALL NUMBER OF THEM, AND THEY'RE ALL ONE PAGE EACH.

16 **THE COURT:** THEY HAVE THE SCREENS AND THEY WILL TAKE
17 NOTES.

18 **MR. BURSOR:** OKAY.

19 **THE COURT:** LOOK, IF YOU WANT TO -- I'M NOT SURE
20 MR. ELLIS WANTS TO STIP TO HAVE THEM KEEP COPIES OF THOSE.
21 I'M NOT GOING TO GIVE THEM COPIES ABSENT AN AGREEMENT.

22 **MR. BURSOR:** WELL, IN MY EXPERIENCE, YOUR HONOR, AND
23 I KNOW YOUR HONOR HAS DONE MANY MORE TRIALS THAN I HAVE, BUT I
24 HAVE SEEN JUDGES WHO, AT THE END OF THE TRIAL, THEY SEND ALL
25 THE EXHIBITS INTO THE JURY ROOM JUST BY DEFAULT, AND I'VE SEEN

1 JUDGES WHERE THEY MAKE THE JURORS, IF THEY WANT AN EXHIBIT,
2 SEND OUT A NOTE SAYING SEND US THE --

3 **THE COURT:** EVERYTHING GOES IN.

4 **MR. BURSOR:** EVERYTHING GOES IN?

5 **THE COURT:** EVERYTHING GOES IN THAT HAS BEEN
6 ADMITTED.

7 **MR. BURSOR:** THAT'S BEEN ADMITTED INTO EVIDENCE.
8 THAT'S FINE.

9 **THE COURT:** OKAY. SO, AGAIN, IF PEOPLE -- TYPICALLY
10 IF BOTH SIDES HAVE THEIR CHARTS THAT BOTH SIDES WANT THE
11 JURORS TO HAVE COPIES OF THEIR CHARTS, THEN I USUALLY GET A
12 STIPULATION AND EVERYBODY CAN HAVE THEIR OWN COPY.

13 WHEN ONLY ONE SIDE HAS IT, I DON'T TEND TO GET A
14 STIPULATION SO NO ONE GETS IT. EVERYTHING GOES IN.

15 AND TO THAT POINT, AND IT'S IN MY STANDING ORDER, THE JURY
16 NEEDS AN INDEX TO GO IN WITH THE EXHIBITS. YOU ARE REQUIRED
17 TO DO THAT DAILY. SO THAT WHEN THE JURY FINISHES AND
18 ARGUMENTS FINISH AND WE SEND THEM IN THERE, I'M GOING TO ASK
19 YOU FOR A COPY OF THAT INDEX BECAUSE THEY WANT THOSE EXHIBITS.
20 AND I'M NOT GIVING YOU A LOT OF TIME TO PREP IT. SO YOU DO IT
21 ON A DAILY BASIS SO YOU ARE READY TO HAVE THAT THING READY TO
22 GO, AND EMAIL IT TO ME OR WHATEVER SO WE CAN PRINT IT UP.

23 THEN SOMEONE WILL BE REQUIRED TO WORK -- TO BE HERE AND TO
24 GO THROUGH EACH OF THOSE EXHIBITS. I NEED ONE PERSON FROM
25 EACH SIDE WHO IS RESPONSIBLE WITH MY COURTROOM DEPUTY, AND THE

1 THREE OF YOU WILL GO THROUGH AND AGREE THAT EVERYTHING HAS
2 BEEN ADMITTED, IT IS APPROPRIATE TO GO INTO THE JURY ROOM.
3 AND THAT GETS DONE IMMEDIATELY AFTER TRIAL. OKAY?

4 THIS ISN'T A BIG DOCUMENT CASE, BUT IN BIG DOCUMENT CASES
5 IT'S A PROBLEM.

6 ALL RIGHT. ANY OTHER -- WELL, TO THE EXTENT THAT
7 THERE'S -- AND WE CAN TALK ABOUT IT, BUT TO THE EXTENT THAT
8 THERE IS ELECTRONIC VERSIONS OF THINGS THAT ARE TOO SMALL,
9 IT'S ALWAYS GOOD IF I CAN SEND IN AN ELECTRONIC VERSION. BUT
10 I ALSO HAVE TO RESERVE -- I DON'T THINK ANYONE IS IN TRIAL SO
11 IT SHOULDN'T BE A PROBLEM TO GET THE COMPUTER.

12 **MR. BURSOR:** YOUR HONOR, WE STARTED OUT THE HEARING
13 TALKING ABOUT 504 AND 505 AND OUR VIEW THAT OUR IN LIMINE
14 MOTION WAS OVERRULED, BUT THAT'S WITHOUT PREJUDICE. MANY OF
15 THE OBJECTIONS REQUIRE A FOUNDATION TO BE LAID, AND SO FORTH.

16 **THE COURT:** RIGHT.

17 **MR. BURSOR:** GIVEN YOUR HONOR'S PREFERENCE FOR
18 DEALING WITH AS MUCH AS POSSIBLE IN ADVANCE --

19 **THE COURT:** I DON'T THINK THAT SOME OF THOSE CAN BE
20 DEALT WITH IN ADVANCE. THEY ARE GOING TO LAY THE FOUNDATION.
21 IF YOU WANT TO OBJECT, IF YOU DON'T THINK IT IS SUFFICIENT,
22 OBJECT, BASED UPON WHAT THE TESTIMONY IS, I'LL RULE.

23 **MR. BURSOR:** OKAY.

24 YOUR HONOR, I THINK THE ONLY OTHER THING THAT WE HAD WAS
25 YOUR HONOR HAD REQUESTED THAT WE BRING AN ORDER CONCERNING

1 BRINGING EQUIPMENT INTO THE COURTHOUSE.

2 **THE COURT:** THOSE ARE USUALLY EMAILED, BUT I CAN TAKE
3 THEM.

4 **MR. BURSOR:** DO YOU WANT IT HANDED UP OR WE CAN DO
5 BOTH?

6 **THE COURT:** YOU CAN DO BOTH IS FINE.

7 **THE CLERK:** THEY SHOULD BE E-FILED, TOO.

8 **MR. ELLIS:** OKAY. THANK YOU.

9 **THE COURT:** OKAY. THERE ARE -- MR. ELLIS, ANY
10 QUESTIONS ON EXHIBITS?

11 **MR. ELLIS:** NO, YOUR HONOR.

12 **THE COURT:** WELL, I WENT THROUGH ALL OF THE
13 OBJECTIONS THAT WERE NOTED ON THE LIST, WHICH IS WHAT I
14 THOUGHT PEOPLE WANTED TO TALK ABOUT IN PART TODAY.

15 LET ME JUST SAY THAT WITH RESPECT TO THOSE EXHIBITS FOR
16 WHICH THE ATTORNEY-CLIENT PRIVILEGE HAS BEEN ASSERTED, 80, 81,
17 82, THOSE OBJECTIONS ARE OVERRULED. THERE IS NO
18 ATTORNEY-CLIENT PRIVILEGE.

19 ALL THE OTHER OBJECTIONS THAT WERE NOTED WHEN I LOOKED AT
20 THE EXHIBITS, I THINK MOST OF THOSE I HAVE TO DEAL WITH AT
21 TRIAL.

22 OKAY?

23 **MR. ELLIS:** THANK YOU, YOUR HONOR.

24 YOUR HONOR, CAN I ASK A TECHNICAL PROCEDURAL QUESTION?

25 **THE COURT:** YOU MAY.

1 **MR. ELLIS:** SO IN YOUR PRETRIAL ORDER NO. 1, I THINK
2 YOU TALK ABOUT THE PHOTOGRAPHS --

3 **THE COURT:** YES.

4 **MR. ELLIS:** -- OF THE WITNESSES?

5 **THE COURT:** YES.

6 **MR. ELLIS:** I THINK I'VE GOT THIS RIGHT, YOU
7 INDICATED THAT YOU WANTED THOSE TAKEN THE DAY OF TRIAL. CAN
8 I -- MY WITNESSES, YOU KNOW, I'M PREPPING THIS WEEK FROM RASH
9 CURTIS, CAN I TAKE THEIR PICTURES BEFORE THE DAY OF TRIAL?

10 **THE COURT:** NO. YOU'VE GOT TWO GUYS WITH YOU. DO
11 YOU GUYS HAVE CELL PHONES?

12 **MR. VALENTI:** NOT IN THE COURTROOM, YOUR HONOR.

13 **THE CLERK:** WELL, THE PICTURES NEED TO BE TAKEN
14 OUTSIDE THE COURTHOUSE ANYWAY.

15 **THE COURT:** THAT'S MY POINT. YOU HAVE CELL PHONES.
16 EVERYONE WHO HAS A CELL PHONE HAS AN AUTOMATIC CAMERA ON THEIR
17 PHONE UNLESS YOU ARE STILL USING SOME FLIP PHONE, MR. ELLIS.

18 **MR. ELLIS:** OH, STOP, YOUR HONOR. YES, I HAVE A 4S.

19 **THE COURT:** OKAY. SO ALL YOU HAVE TO DO IS YOU STAND
20 OUTSIDE, YOU PUT THEM NEXT TO A BLANK WALL, YOU TAKE THEIR
21 PICTURE, AND THEN YOU PRINT IT AND GIVE IT TO ME IN THE
22 MORNING.

23 PART OF THE THING IS, IF THEY ARE HAVING A BAD DAY, THAT'S
24 WHAT THEY LOOK LIKE. IF THEY ARE HAVING A GOOD DAY, THAT'S
25 WHAT THEY LOOK LIKE. WE DON'T WANT THEM POSED. WE DON'T WANT

1 YOU, YOU KNOW, NICE BACKGROUND, WHATEVER. TAKE THEIR PICTURE
2 BEFORE THEY COME IN, AND THEN YOU PRINT THEM UP. I NEED NINE
3 COPIES, EIGHT FOR THE JURORS AND ONE FOR ME.

4 **MR. BURSOR:** WE ARE REQUIRED TO EXCHANGE ANY
5 DEMONSTRATIVES FOR THE OPENING STATEMENT, I THINK, ON
6 WEDNESDAY.

7 **THE COURT:** CORRECT.

8 **MR. BURSOR:** I PREVIOUSLY ASKED FOR PERMISSION TO USE
9 HEAD SHOTS IN THE OPENING STATEMENTS. OBVIOUSLY THOSE CAN'T
10 BE TAKEN THE DAY OF.

11 **THE COURT:** YOU CAN USE THEM IN CLOSING.

12 **MR. BURSOR:** I WAS -- WE HAVE SIX OR SEVEN
13 WITNESSES --

14 **THE COURT:** YOU CAN USE YOUR OWN. I'M ASKING FOR
15 PHOTOS DAY OF.

16 **MR. BURSOR:** THAT'S ALL I'M ASKING IS, CAN I JUST USE
17 MY OWN PHOTOS IN THE OPENING?

18 **THE COURT:** YEAH.

19 **MR. BURSOR:** OKAY.

20 **THE COURT:** ALL RIGHT. OTHER QUESTIONS?

21 **MR. BURSOR:** YOUR HONOR, JUST GENERALLY ON
22 SCHEDULING?

23 **THE COURT:** UH-HUH.

24 **MR. BURSOR:** WE HAVE BEEN WORKING REALLY HARD TO
25 STREAMLINE, AND IT LOOKS LIKE WE ARE RIGHT ON THE CUSP. YOUR

1 HONOR GAVE US 11 HOURS PER SIDE AND OPENING STATEMENTS ARE
2 GOING TO HAPPEN ON THE MONDAY. AND THAT'S GOING TO COUNT
3 AGAINST OUR 11 HOURS, BUT THAT WILL LEAVE A LITTLE EXTRA TO
4 SPILL OVER INTO THE FOLLOWING WEEK. AND I'M VERY INTERESTED
5 IN TRYING TO MAKE THAT NOT HAPPEN. SO IS --

6 **THE COURT:** SO, I DON'T UNDERSTAND WHAT YOU MEAN BY
7 THAT.

8 **MR. BURSOR:** I WOULD VERY MUCH LIKE TO HAVE THE TRIAL
9 BEGIN AND END IN THE SAME WEEK. AND BASED ON THE TIME THAT
10 YOU'VE GIVEN US --

11 **THE COURT:** YOU ARE NOT GOING TO BE HERE FOR
12 DELIBERATIONS?

13 **MR. BURSOR:** WELL, I WANT THE JURY TO GET THE CASE ON
14 FRIDAY. I'M STAYING UNTIL THERE IS A VERDICT.

15 ONE QUESTION IS, THE 11 HOURS THAT YOU GAVE US WILL APPLY
16 TO BOTH PHASE I AND PHASE II; IS THAT RIGHT?

17 **THE COURT:** WE HAVEN'T HAD A DISCUSSION ABOUT
18 PHASE II UNTIL TODAY.

19 **MR. BURSOR:** OKAY.

20 SO I WOULD URGE THAT THAT BE THE TOTAL TIME ALLOWED FOR
21 BOTH PHASES AND HAVE THERE BE NO ADDITIONAL TIME FOR PHASE II.
22 JUST WHATEVER IS LEFT OF YOUR 11 HOURS YOU GET TO USE TO
23 ENCOURAGE THE PARTIES TO NOT WASTE TIME DURING THE TRIAL AND
24 MOVE THINGS ALONG.

25 **MR. ELLIS:** I DON'T AGREE. 11 HOURS IS GOING TO GO

1 FAST, AND WE ARE TALKING ABOUT PHASE II FOR THE FIRST TIME
2 TODAY. I MAY STIPULATE TO --

3 **THE COURT:** HERE'S THE OTHER THING. IF THERE'S A
4 SCHEDULING ISSUE, MR. BURSOR, IS THIS A SCHEDULING PROBLEM FOR
5 YOU?

6 **MR. BURSOR:** IT'S NOT A PROBLEM, I JUST WANT TO BE
7 EFFICIENT. I DON'T WANT TO HAVE THE TRIAL SPAN TWO WEEKS IF
8 IT CAN BE RESOLVED IN ONE WEEK.

9 **MR. ELLIS:** I AGREE WITH THAT. I WANT TO BE
10 EFFICIENT, TOO, BUT, YOU KNOW, WE ARE STANDING AT THE PODIUM
11 ON THE LAST DAY. WE ARE NOW TALKING ABOUT SPLITTING
12 POTENTIALLY TWO TRIALS AND USING THE SAME TIME PERIOD. I
13 JUST -- I WOULD HAVE TO THINK ABOUT THAT, YOUR HONOR.

14 **THE COURT:** I HAVE TO THINK ABOUT IT, TOO. HERE'S --
15 ONE IS, WHEN I ORIGINALLY SET THOSE TIMES, I WAS CERTAINLY
16 THINKING, BECAUSE IT WAS TEED UP THAT WAY AND I HADN'T WORKED
17 THROUGH ALL THE ISSUES, THAT THE ISSUE OF GOOD FAITH WAS PART
18 OF THE TRIAL. AND SO TECHNICALLY I HAD CONSIDERED THAT
19 ALREADY.

20 NOW, YOU STILL HAVE TO, YOU KNOW, WHEN YOU DO THINGS IN
21 MULTIPLE PHASES, IT'S NOT ALWAYS THAT EASY. BUT IT SEEMS TO
22 ME THAT WHILE WE ARE SITTING HERE WAITING FOR A VERDICT,
23 THAT'S WHEN I DO PHASE II. I MEAN THAT'S WHEN I WOULD
24 TYPICALLY DO IT. SO WE ARE SITTING HERE ANYWAY, AND WE ARE
25 ALL HERE. AND WHEN I'VE GOT A BENCH TRIAL, YOU KNOW, I AM

1 MUCH MORE APT TO TELL YOU TO MOVE ON, STOP REPEATING
2 YOURSELVES. IF I HAVE QUESTIONS, I ASK QUESTIONS. I AM MUCH
3 MORE INVOLVED MYSELF IN A TRIAL WHEN IT'S JUST ME.

4 SO, YOU LET ME KNOW WHAT YOU THINK YOU NEED, MR. ELLIS.
5 AND YOU CAN LET ME KNOW BY WEDNESDAY WHEN YOU PUT THIS OTHER
6 STUFF IN.

7 **MR. ELLIS:** THANK YOU, YOUR HONOR, I WILL.

8 **THE COURT:** DO WE HAVE YOUR -- DID YOU ALL SIGN THE
9 STIPULATION?

10 **THE CLERK:** I DON'T THINK THEY HAVE.

11 **THE COURT:** AS PART OF MY STANDING ORDER, I HAVE A
12 PROCEDURAL STIPULATION WHICH I ASK YOU ALL TO SIGN AND TO
13 FILE. I WILL LOOK FOR IT. IF YOU HAVEN'T DONE IT, I NEED YOU
14 TO DO THAT.

15 AND THAT, IN EFFECT, ALLOWS -- SOMETHING HAPPENS TO ME, IT
16 ALLOWS ANOTHER JUDGE TO TAKE THE VERDICT. IT ALLOWS EXHIBITS
17 TO GO IN WITHOUT OBJECTIONS. IT ALLOWS ME TO EXCUSE THE
18 JURORS IF YOU ARE NOT IN THE COURTROOM. IT'S ALL PROCEDURAL
19 ISSUES, AND I WOULD LIKE THAT TO BE INITIALED. AND IF YOU
20 HAVE ANY CONCERNS, THEN WE CAN TALK ABOUT THEM. I'LL
21 DOUBLE-CHECK ON THAT.

22 OKAY. ANY OTHER ISSUES?

23 **MR. BURSOR:** NO, YOUR HONOR. NOT FROM PLAINTIFFS.

24 **MR. ELLIS:** NO, YOUR HONOR.

25 **THE COURT:** OKAY. ALL RIGHT. THEN I WILL SEE YOU ON

1 MONDAY. IF YOU NEED ME, SEND A NOTE TO MY COURTROOM DEPUTY
2 AND WE CAN GET ON THE PHONE.

3 WE ARE ADJOURNED.

4 **MR. ELLIS:** THANK YOU, YOUR HONOR.

5 **MR. BURSOR:** THANK YOU.

6
7 (PROCEEDINGS ADJOURNED AT 11:50 A.M.)

8
9 **CERTIFICATE OF REPORTER**

10 I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
11 UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
12 CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
13 RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

14
15 

16 DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

17 MONDAY, APRIL 29, 2019
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